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In the

SUPREME COURT OF THE UNITED STATES

October Term 1994

JEAN JOSEPH DEEB,
petitioner,

v.

UNITED STATES OF AMERICA,
respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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October 31, 1994

QUESTIONS PRESENTED

1. Can the admission of former testimony against an accused who was neither a party nor present at the trial at which an unavailable accomplice-declarant gave that testimony be reconciled with the constraints established by Rules 802 and 804(b)(1) and (5) of the Federal Rules of Evidence and by the Confrontation Clause of the Constitution of the United States?

a. Can the decision below, which ruled that cross-examination at a different trial by a party other than the accused justified the admission of former testimony given by an unavailable declarant at the accused's trial under the "Other Exceptions" provisions of Rule 804(b)(5), be reconciled with Congress's explicit decision to reject the former-testimony rule in the form submitted by the Supreme Court, which would have authorized the admission of former testimony in this circumstance, and to adopt instead Rule 804(b)(1) in its present form, which continued the established prohibition against the admission of former testimony unless the accused had had an opportunity to confront and examine the declarant at the proceeding at which the testimony was given?

b. Can the decision below, which ruled that cross-examination that only made explicit the "indicia of unreliability" inherent in testimony given pursuant to a plea bargain by an unsentenced accomplice provided "particularized guarantees of trust-worthiness" sufficient to justify the admission of that accomplice's former testimony, be reconciled with the requirements of the Confrontation Clause as construed and applied in *Idaho v. Wright*, 497 U.S. 805 (1990)?

2. Does the Confrontation Clause, as construed and applied in *Lee v. Illinois*, 476 U.S. 530 (1986), and *Coy v. Iowa*,

487 U.S. 1012 (1988), require that the admissibility of former testimony given by an unavailable accomplice-declarant be restricted to cases in which the accused had the opportunity to confront and examine the accomplice at the hearing at which the former testimony was given?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES v

PETITION FOR WRIT OF CERTIORARI 1

OPINION BELOW 1

JURISDICTIONAL STATEMENT 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

1. The Nature of the Case 3

2. The Material Facts 4

3. The Statutory Framework 7

4. The Constitutional Framework 11

REASONS WHY REVIEW SHOULD BE GRANTED . 14

1. The Court should grant review to resolve the conflict among the circuits over the nature and extent of the discretion conferred upon the district courts by Rule 804(b)(5) to admit hearsay statements in criminal cases over the objection of the accused 14

2. The Court should grant review to clarify the extent and limits of the discretion conferred upon the district courts by Rule 804(b)(5) to admit hearsay statements not covered by the specific exceptions to the hearsay rule that Congress considered and approved. 16

3. The Court should grant review to clarify the circumstances in which former testimony given by an unavailable accomplice may be admitted and used against an accused under the Confrontation Clause . 19

4. The Court should grant review because the rule announced by the court below will have a significant effect upon the conduct of civil as well as criminal trials in federal district courts 23

CONCLUSION 26

APPENDIX

United States v. Deeb, 13 F.3d 1532 (11th Cir. 1994) (opinion below) 1a

United States v. Deeb, No. 88-582-CR (S.D. Fla. Mar. 26, 1991) (district court judgment of conviction and sentence) 23a

United States v.Deeb, No. 91-5253 (11th Cir. Aug.2, 1994) (order denying petition for rehearing) 27a

United States v. Deeb, No. 91-5253 (11th Cir.Feb. 15, 1994) (judgment of court of appeals) 29a

TABLE OF AUTHORITIES

Constitutional and Statutory Provisions

U. S. Const., amend VI (Confrontation Clause) . . . *passim*

28 U.S.C. §§ 1291 and 1294(b) 2

28 U.S.C. § 1254(1) 2

Federal Rules of Evidence for United States Courts and Magistrates:

Rule 802 2
Rule 804(b)(1) . . . . . *passim*
Rule 804(b)(5) . . . . . *passim*

Judicial Decisions

Bourjaily v. United States, 483 U.S. 171 (1987) . . . 12,16

Bruton v. United States, 391 U.S. 123 (1968) . 11,13,19,22

California v. Green, 399 U.S. 149 (1970) 12,19.22

Coy v. Iowa, 487 U.S. 1012 (1988) i,11,14,22

Dallas County v. Commercial Union Assurance Co., 286 F.2d 388 (5th Cir. 196l) 17

Daretz v. Fibreboard Corp., 765 F.2d 456 (5th Cir. 1985) 25

Daubert v. Dow Merrell Pharmaceuticals, Inc., 113 S. Ct. 2786 (1993) 16

Davis v. Alaska, 415 U.S. 308 (1974) 11

Douglas v. Alabama, 380 U.S. 415 (1965) . . . 11,13,19,22

Garner v. United States, 439 U.S. 936 (1978) (Stewart, J., dissenting from denial of certiorari) 14

Huddleston v. United States, 485 U.S. 681 (1989) 16

Idaho v. Wright, 497 U.S. 805 (1990) . . . . . *passim*

Lee v. Illinois, 476 U.S. 530 (1986) . . . . . *passim*

Ohio v. Roberts, 448 U.S. 56 (1980) 11,13,19,22

Williamson v. United States, 114 S. Ct. 2431 (1994) 11,13,19,22

United States v. Accetturo, 966 F.2d 631 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 1053 (1993) 15

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United States v. Ellis, 951 F.2d 580 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 3030 (1992) 15

United States v. Gomez-Lemos,
939 F.2d 326 (6th Cir. 1991) 15

United States v. Gonzalez,
559 F.2d 1271 (5th Cir. 1977) 14

United States v. Lang, 904 F.2d 618 (11th Cir.),
cert. denied, 498 U.S. 924 (1990) 14

United States v. Vigoda, 656 F. Supp. 1499 (D. N.J.
1987), *aff'd.*, 857 F.2d 1467 (3rd Cir. 1988) 18

United States v. West, 574 F.2d 1131 (4th Cir. 1978) . . 14

United States v. Zannino, 895 F.2d 1 (1st Cir.),
cert. denied, 110 S. Ct. 1814 (1990) 15

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NEWS 7098 (report of the conference committee on proposed federal rules of evidence) 10,17

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reproduced at 1974 U.S. CODE, CONG., & AD.
NEWS 7075 (report on proposed federal rules
of evidence) 9

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Senate Judiciary Committee, S. Rep No. 93-1277, *reproduced at* 1974 U.S CODE, CONG., & AD. NEWS 7051 (report on proposed federal rules of evidence) 9,10,17

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1994

JEAN JOSEPH DEEB,
petitioner,

v.

UNITED STATES OF AMERICA,
respondent.

PETITION FOR WRIT OF CERTIORARI

Jean Joseph Deeb petitions the Court to issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit to review the judgment that that court entered against him in its Case No. 91-5253.

OPINION BELOW

The opinion of the court of appeals is reported as *United States v. Deeb*, 13 F.3d 1532 (11th Cir. 1994), and is reproduced in the appendix to this petition at 1a-22a.

JURISDICTIONAL STATEMENT

The court of appeals entered its judgment on February 15, 1994 (29a). Petitioner filed a timely petition for rehearing. On August 2, the court of appeals entered an order denying the

petition for rehearing and rehearing *en banc* (27a).[1] The present petition was filed with this Court on October 31, 1994. The court of appeals had jurisdiction under 28 U.S.C. §§ 1291 and 1294(b). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provision

"In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ...." U.S. Const., amend. VI.

Statutory Provisions

Rule 802. **Hearsay Rule**

> Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

Rule 804. **Hearsay Exceptions; Declarant Unavailable**

* * *

(b) **Hearsay exceptions**. The following are not

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[1] The court of appeals ordered the government to respond. The government sought leave to defer filing its response until this Court issued its decision in *Williamson v. United States*, 114 S. Ct. 2431 (June 27, 1994). Leave was granted, and the government filed its response on July 8.

excluded by the hearsay rule if the declarant is unavailable as a witness:

> (1) **Former Testimony**. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.
>
> * * *
>
> (5) **Other exceptions**. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that ... [the statement and its admission satisfy additional requirements imposed by provisions of the rule not involved in this case].

Rule 804 (b), Federal Rules of Evidence for United States Courts and Magistrates.

STATEMENT OF THE CASE

1. *The Nature of the Case*. At petitioner's trial, the government was permitted to have read to the jury former testimony that an admitted participant in the alleged crime had given pursuant to a plea agreement at a trial at which petitioner was neither present nor represented. The court of appeals concluded that the residual exception to the hearsay rule authorized the admission of former testimony given by an accomplice-declar-

ant, if someone other than the accused had cross-examined the declarant to probe his motive to lie. Specifically, the court of appeals held:

> ... [W]e conclude that when testimony offered under the residual hearsay exception has been subject to cross-examination by someone other than the defendant, that cross-examination serves as the functional equivalent of cross-examination by the defendant if two conditions are met: 1) the cross-examination probed the witness's motive or inducement to lie; and, 2) the defendant has not shown that the absence of an opportunity to personally cross-examine the witness deprived him of an opportunity to present evidence that would have undermined the probative value of the witness's testimony against the defendant.

Deeb at 17a. That ruling poses important questions concerning the extent to which Congress and the Constitution have imposed effective limits on the authority of the federal courts to develop new exceptions to the hearsay rule in addition to those that Congress authorized when it adopted the Federal Rules of Evidence.

2. *The Material Facts.* In August 1988, federal agents determined that a coastal freighter that had recently arrived in Miami from Haiti was carrying a substantial quantity of cocaine. They placed the vessel under surveillance and subsequently observed boxes being transferred from the freighter to a van. They followed the van to a duplex apartment nearby. Shortly thereafter, a white Jeep stopped near the apartment, and the passenger got out and spoke with a man in the apartment. The passenger returned to the Jeep, and the Jeep drove to a nearby restaurant parking lot, where the passenger again got

out and was observed making some telephone calls from a public telephone. A short time later, a Volkswagen Jetta pulled into the parking lot next to the Jeep. The agent who testified to observing these events reported that the driver of the Jeep spoke with the occupants of the Jetta. Both vehicles proceeded by separate routes to the apartment. A man got out of the Jetta and into the van and began to drive away. At that point all were arrested -- the two occupants of the Jeep, the driver of the Jetta, the driver of the van, and the two occupants of the apartment -- and the cocaine was seized. Petitioner Deeb was the driver of the Jeep. Serge Biamby was the passenger. Munero Cadavid was the driver of the Jetta. Gilberto Gomez-Gallago was the passenger in the Jetta and the driver of the van.[2]

The indictment charged Deeb, Biamby, Cadavid, and Gomez-Gallago with importing and conspiring to import cocaine and with possessing and conspiring to possess cocaine with intent to distribute. The remaining defendants were charged as participants in one or more related offenses. Prior to the scheduled trial, Biamby entered into a plea agreement with the government under which he agreed to plead guilty to one count of the indictment and to testify for the government in exchange for which the government dismissed the remaining counts and agreed that his cooperations could be used as a basis for a downward departure at sentencing.[3]

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[2] The government conceded that Deeb was an established, legitimate businessman with no known connection to any drug transactions prior to the events that gave rise to his arrest. Biamby, however, had an extensive history in drug dealing in Haiti. Facts concerning the backgrounds of Cadavid and Gomez-Gallago are not part of the record in this case.

[3] Gomez-Gallago also entered into a plea agreement. Neither the

The case was set for trial in July 1989. Deeb failed to appear. The government moved to try him *in absentia*. The district court denied the motion, severed the charges against him, and proceeded with the trial of the remaining defendants. Neither Deeb nor his counsel was present for any part of that trial. At that trial, Biamby testified that Deeb had been the principal in the scheme and had retained Biamby to make arrangements for the cocaine to be received in Haiti and reshipped to Miami and that Deeb had introduced Biamby to Cadavid as the other principal in scheme. His testimony concerning the events that occurred on the day of the arrest differed in material respects from the account given by the agent who claimed to have observed them. Counsel for Cadavid cross-examined Biamby about his plea agreement, the benefits he had received, and the benefits he hoped to gain at sentencing as a result of his testimony. Counsel for Cadavid had no reason to and did not develop the inconsistencies between Biamby's account of the events that preceded the arrest and the account given by the agent or develop the nature of Biamby's relationship with Deeb. Cadavid was convicted.

In February 1990, Deeb was apprehended in the Dominican Republic, where he had a plastics factory, and returned to Miami for trial. Two months later, the government first disclosed that Biamby was terminally ill with AIDS and was suffering from progressive memory deterioration.[4] Deeb did not

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terms of his agreement nor the content of any cooperation he may have provided are part of the record in this case.

[4] There was no evidence to suggest that Deeb knew of Biamby's illness when he fled (8a n.1). When the government disclosed Biamby's condition, it was granted leave to take his deposition in an effort to preserve his testimony for trial. In light of the ruling of the court

question the government's claim that Biamby was unavailable within the meaning of Rule 804(a) at the time of his trial. The government's case against Deeb consisted of the testimony of the agents who had participated in the surveillance, arrest, and subsequent investigations and, over repeated objection, the former testimony of Biamby, which was read to the jury by the government's case agent. Deeb testified in his own behalf and provided an innocent explanation for his association with Biamby and his presence in the Jeep on the day of the arrest. To explain his failure to return for the first trial, he tried to testify that he had panicked when he learned that Biamby had entered into a plea bargain, because Biamby had previously assured Deeb that Biamby had told the government case agent and the prosecutor that Deeb was innocent. The presiding judge ruled, however, ruled that Deeb's testimony about what Biamby told him was inadmissible hearsay. Four other witnesses, whose legitimacy the government did not challenge, testified to Deeb's experience and reputation as a legitimate business man. Two of these confirmed that, during the summer of 1988, they had participated with Deeb in the sale of 5000 tons rice to Haiti in which Deeb had retained Biamby to make the necessary arrangements in Haiti. The government made no claim that Biamby's former testimony was not central to its case in chief. Deeb was convicted and sentenced to 270 months in prison followed by ten years supervised release.

3. *The Statutory Framework.* The proposed version of Rule 804(b)(1) submitted to Congress by the Court would have created an exception to the hearsay rule for a statement given by an unavailable declarant that was:

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of appeals (4a-8a), the issues arising from that procedure are not material here.

> (1) *Former Testimony*. Testimony given as a witness at another hearing of the same or different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, at the instance of or against a party with an opportunity to develop the testimony by direct, cross, or redirect examination, *with motive and interest similar to those of the party against whom now offered*.

Rules of Evidence For United States Courts and Magistrates, 56 F.R.D. 183, 321 (U.S. 1972) (rules as submitted to Congress; emphasis added).

The Advisory Committee Notes made it clear that the proposed rule represented a change from established principle:

> ... [T]he common law also insisted upon identity of parties, deviating only to the extent of allowing substitution of successors in a narrowly construed privity .... The question remains whether strict identity, or privity, should continue as a requirement with respect to the party against whom offered. The [proposed] rule departs to the extent of allowing substitution of one with the right and the opportunity to develop testimony with similar motive and interest ....

Id. at 324.

Rule 804(b)(1), in the form adopted by Congress, rejected the departure proposed by the Advisory Committee and adopted instead the common-law rule. Under the rule that Congress prescribed, to be admissible, former testimony by an unavailable declarant must be:

> (1) *Former Testimony*. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, *if the party against whom the testimony is now offered*, or, in a civil action or proceeding, a predecessor in interest, *had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.*

Emphasis added.

The legislative history makes it clear that Congress considered and rejected the rationale suggested by the Advisory Committee:

> Rule 804(b)(1) as submitted by the Court allowed prior testimony of an unavailable witness to be admissible if the party against whom it is offered or a person "with motive and interest similar" to his had an opportunity to examine the witness. The Committee considered that it is generally unfair to impose upon the party against whom the hearsay evidence is being offered responsibility for the manner in which the witness was previously handled by another party. The sole exception to this, in the Committee's view, is when a party's predecessor in interest in a civil action or proceeding had an opportunity and similar motive to examine the witness. The Committee amended the Rule to reflect these policy determinations.

House Judiciary Committee, H. Rep. No. 93-650, *reproduced* in 1974 U.S. CODE, CONG., & AD. NEWS 7075, 7088 (quoted excerpt), 7074 (Senate concurrence in House version).

The rules submitted by the Court also included provisions establishing residual exceptions to the hearsay rule, but the Advisory Committee Notes reflected an awareness of the need for careful limitation: "They ... provide for treating new and *presently unanticipated* situations which demonstrate a trustworthiness within the spirit of the specifically stated exceptions." 56 F.R.D. at 320, 328; *emphasis added*. The proposal was controversial, and the version ultimately approved by Congress was narrower than the version submitted by the Court. 1974 U.S. CONG., CODE, AND AD. NEWS at 7065-66 (Senate Report), 7106 (Conference Report accepting Senate position). Moreover, Congress made clear the limitations it intended the courts to observe when it entrusted them with this limited authority: "The residual exceptions are not meant to authorize major revisions of the hearsay rule, including its present exceptions. Such major revisions are best achieved by legislative action." *Id.* at 7066.

The situation presented by this case was one that was *clearly anticipated* when the proposed Federal Rules of Evidence were under consideration. The Advisory Committee recommended and the Court submitted an exception that would have authorized the admission of former testimony by an unavailable declarant in criminal cases, if a party with motive and interest similar to that of the party against whom it was offered had had the right and opportunity to cross-examine the declarant at the prior proceeding. Congress considered and rejected that view as unfair and codified what it determined to be the appropriate policies. Against this background, the panel's decision poses squarely a recurring problem upon which the courts of appeal have divided frequently -- the question of the scope of the authority conferred upon the district courts by Rule 804(b)(5).

4. *The Constitutional Framework.* The Confrontation Clause secures two rights -- the right of the accused to a face-to-face confrontation with the witnesses against them, e.g., *Coy v. Iowa*, 487 U.S. 1012 (1988), and the right to test the testimony that those witnesses give fully by cross-examination, e.g., *Davis v. Alaska*, 415 U.S. 308 (1974). If a declarant is not available, however, the Confrontation Clause does not preclude the admission against an accused of prior statements made by that declarant if the circumstances in which the statements were made provide indicia of reliability that the hearsay statement is "so trustworthy that the test of cross-examination would be of marginal utility," *Idaho v. Wright*, 497 U.S. 805, 823 (1990). As a general matter, statements that fall within a "firmly rooted" hearsay exception may be admitted without further analysis. E.g., id. at 816, 820 (collecting authorities). Those that do not are presumptively unreliable, and the proponent must establish that they were made in circumstances that provided intrinsic particularized guarantees of trustworthiness that render the declarant particularly worthy of belief. Id. at 819, 820.

The court of appeals acknowledged that the former testimony admitted in this case did not fit with the firmly rooted exception for former testimony. *Deeb* at 4a-8a, 13a. That court also recognized that the former testimony was given in circumstances that maximized its presumptive unreliability. Id. at 11a-14a. It was a custodial statement made by an accomplice pursuant to a plea agreement under which the extent of the benefits realized would be determined in the future based upon the perceived value of his testimony in implicating his alleged confederates. Id.; see also *Douglas v. Alabama*, 380 U.S. 415 (1965), *Bruton v. United States*, 391 U.S. 123 (1968), *Lee v. Illinois*, 476 U.S. 530 (1986), and *Williamson v. United States*, 114 S. Ct. 2431 (1994). The former testimony was, however,

a statement accompanied by two circumstances that the court below viewed as providing the necessary indicia of reliability -- it was under oath and was subjected to cross-examination. *Deeb* at 14a-17a. It is the view that the lower court adopted with respect to the significance of the cross-examination that poses the constitutional questions raised by this petition.

Many of the "firmly rooted" exceptions to the hearsay rule apply to statements made in circumstances that have long been viewed as enhancing their trustworthiness -- e.g., dying declarations and statements against penal interest. Although the Court has not developed the distinction fully, there are firmly rooted exceptions to the hearsay rule whose justification is based upon considerations of fairness rather than the presence of intrinsic circumstantial indicia of reliability. For example, the Court has recognized that statements by a co-conspirator are often made in circumstances that do not commend their reliability and has recognized that the courts must look for extrinsic corroborating circumstances to justify their admission. *Bourjaily v. United States*, 483 U.S. 171 (1987).

A fair reading of the Court's former-testimony decisions supports the view that the rationale for admitting former testimony in criminal cases also derives its justification more from principles of fairness than from any circumstantial indicia giving rise to a presumption of reliability -- the declarant is now unavailable, but on a prior occasion the accused was afforded both the personal opportunity of a face-to-face confrontation and the personal opportunity to have the declarant's statements developed and tested fully on examination or cross-examination. For example, in *California v. Green*, 399 U.S. 149 (1970), the Court approved the admission of preliminary hearing testimony given by a youth who testified that he had purchased marihuana from the accused, after the youth had

himself been arrested for selling marihuana -- in effect, former testimony by an accomplice. In *Ohio v. Roberts*, 448 U.S. 56 (1980), the Court upheld the admission of preliminary hearing testimony given by the victim's daughter, who had given the accused permission to live in her parents' apartment. In each case, the declarant and the testimony had little to commend its reliability; in each, the accused had, however, had a fair opportunity to confront the witness and develop the testimony at the hearing at which it was given.

The circumstances presented by the present petition clearly illustrate the distinction between the two rationales. The Court has consistently recognized that custodial statements made by an accomplice that implicate an accused are presumptively unreliable. *Douglas v. Alabama*, *Bruton v. United States*, *Lee v. Illinois*, and *Williamson v. United States*. The former testimony given by Biamby was an extreme illustration -- it was testimony given by an accomplice pursuant to a favorable plea agreement with the hope of earning the prosecutor's recommendation for a downward departure from the onerous sentence dictated by the Federal Sentencing Guidelines. *Deeb* at 14a-16a. In such circumstances, the purpose of cross-examination was not, and could not have been, to enhance the reliability of his testimonial statements. Its function was and could only have been to make explicit the indicia that made it presumptively unreliable. That cross-examination did not function, and could not have functioned, to render the accomplice-declarant "particularly worthy of belief."

The lower court's decision that the cross-examination of Biamby by counsel for Cadavid provided the indicia of reliability necessary to justify admission of Biamby's former testimony at Deeb's trial, thus, squarely poses the two constitutional questions raised by this petition. Does cross-examination that

only makes explicit the indicia of unreliability inherent in accomplice testimony provide the particularized guarantees of trustworthiness required by the Confrontation Clause as interpreted in *Idaho v. Wright*? Do the rationale underlying the former testimony exception and the requirements of fundamental fairness and the Confrontation Clause, as interpreted in *Coy v. Iowa*, merge to limit the admissibility of former testimony given by an accomplice cooperating with the government to cases in which the accused against whom it is offered was present and had the opportunity to confront the declarant and cross-examine the testimony at the time it was given?

REASONS WHY REVIEW SHOULD BE GRANTED

1. **The Court should grant review to resolve the conflict among the circuits over the nature and extent of the discretion conferred upon the district courts by Rule 804(b)(5) to admit hearsay statements in criminal cases over the objection of the accused.** The lower federal courts have divided over the meaning and extent of the authority conferred upon them by Rule 804(b)(5) since its adoption. Prior to *Idaho v. Wright*, the primary source of the division stemmed from cases in which the government sought to have admitted uncross-examined testimony given before a grand jury. The Fourth, Sixth, Seventh, Eighth, and Ninth Circuits adopted the view that Rule 804(b)(5) authorized the admission of extrinsically corroborated grand-jury testimony. The Fifth Circuit and, until recently, the Eleventh Circuit took a more restrictive view. See, e.g., *United States v. West*, 574 F.2d 1131 (4th Cir. 1978) (early decision upholding admission); *United States v. Gonzalez*, 559 F.2d 1271 (5th Cir. 1977) (early decision rejecting admission); *Garner v. United States*, 439 U.S. 936 (1978) (Stewart, J., noting conflict and dissenting from denial of certiorari); *United States v. Lang*, 904 F.2d 618, 622 n.5, 623

(11th Cir. 1990) (rejecting admissibility and summarizing pre-*Wright* positions of the various circuits); compare *United States v. Zannino*, 895 F.2d 1 (1st Cir. 1990) (relying upon decisions upholding admission of grand-jury testimony to uphold admission of former testimony given by victim at trial of accused's co-defendants).

The Court's decision in *Idaho v. Wright* has had the effect of compelling the lower courts to articulate their decisions in terms of the intrinsic circumstances in which the challenged statements were made, but has not reduced the divergence in views. See, e.g., *United States v. Ellis*, 951 F.2d 580 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 3030 (1992) [holding circumstances in which a deceased accomplice made a statement to the police provided sufficient indicia of reliability to justify admission of the statement under Rule 804(b)(5)]; *United States v. Accetturo*, 966 F.2d 631 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 1053 (1993) (court of appeals weighing conflicting circumstantial evidence concerning reliability of alleged loan-sharking debtor's statements implicating defendants and finding indicia of reliability sufficient to justify admission); cf. *United States v. Gomez-Lemos*, 939 F.2d 326 (6th Cir. 1991) (grand-jury testimony of unavailable co-conspirator, given in accordance with plea agreement, held inadmissible under *Idaho v. Wright*).

The use of Rule 804(b)(5) as an ad hoc vehicle for justifying the admission of hearsay statements that could not be justified under the "firmly rooted" exceptions approved by Congress has become commonplace in many circuits. The rationales for these uses diverge. The Court's decision in *Idaho v. Wright* has not eliminated the divergence in views or produced uniformity of decision. See discussion and authorities below at 17 -18. The right of those who come before the lower courts

accused of criminal conduct should not depend upon the circuit in which the charges are brought. The Court should grant review to resolve this persistent issue.

2. **The Court should grant review to clarify the extent and limits of the discretion conferred upon the district courts by Rule 804(b)(5) to admit hearsay statements not covered by the specific exceptions to the hearsay rules that Congress considered and approved.** The Court has uniformly held that the Federal Rules of Evidence should be construed under established principles of statutory construction, principles that respect the language Congress chose and the intent it expressed. See, e.g., *Bourjaily v. United States*, *supra*, [Rule 104(b) precludes federal courts from continuing to apply "bootstrap" rule to insist that existence of conspiracy be proved by evidence independent of co-conspirator's statements before statements can be admitted under Rule 801(d)(1)(E)]; *Huddleston v. United States*, 485 U.S. 681 (1989) [Rule 104(a) precludes federal courts from continuing to require that prior bad acts be proved by a preponderance (or higher) standard as a condition of admissibility under Rule 404(b)]; *Daubert v. Dow Merrell Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993) (Rule 702 precludes continued reliance upon established *Frye*-test for admissibility of scientific evidence in federal courts).

Congress made it clear that it did not intend, by adopting Rule 804(b)(5), to confer authority upon the federal courts to expand or revise the scope of the exceptions to the hearsay rule that Congress had specifically approved.

> The [Senate Judiciary] committee, however, also agrees with those supporters of the House version [which deleted the proposed residual exceptions] who felt that an overly broad residual hearsay exception

> could emasculate the hearsay rule and the recognized exceptions or vitiate the rationale behind codification of the rules....
>
> It is intended that the residual exceptions will be used very rarely, and only in exceptional circumstances. The committee does not intend to establish a broad license for trial judges to admit hearsay statements that do not fall within one of the other exceptions contained in Rules 803 and 804(b). The residual exceptions are not meant to authorize major judicial revisions of the hearsay rule, including its present exceptions. Such major revisions are best accomplished by legislative action....

1974 U.S. CONG., CODE, AND AD. NEWS at 7066 (Senate Report), 7106 (Conference Report accepting Senate position).[5]

Since these residual exceptions were adopted, the federal courts of appeal have made substantial use of them, more substantial than the Senate Report indicates that Congress intended. MCCORMICK ON EVIDENCE at 539-40 (4th ed. 1992) (noting divergence in congressional expectations and judicial use); see also Michael H. Graham, HANDBOOK OF FEDERAL EVIDENCE, §§ 803.24 and 804.5 (3rd ed. 1991) (collecting authorities). The number of decisions approving the admission of hearsay statements under the residual exception to the hear-

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[5] The Senate Judiciary Committee noted only two cases that illustrated the kind of exceptional circumstances in which a residual exception might be necessary. *Dallas County v. Commercial Union Assurance Co.*, 286 F.2d 388 (5th Cir. 1961), and *United States v. Barbati*, 284 F. Supp. 409 (E.D.N.Y. 1968). Id. at 7065-66.

say rule suggests that the lower courts have not been observing the limits that Congress sought to impose upon them. The number of cases that has arisen suggests that the Court should now undertake to provide needed guidance with respect to the proper construction and use of the residual exception rules in any event.

The present case presents a concrete example of the kind of problem that has regularly arisen under Rule 804(b)(5). Congress specifically considered whether the district courts should have discretion to admit former testimony that had been cross-examined by someone other than the accused when it considered Rule 804 (b)(1) in the form submitted by the Court. See authorities discussed and quoted at pages 7-10 above. Congress made a policy judgment that that discretion should not be granted. Id. The court of appeals here rejected the argument that this case presented a situation that was "specifically covered by" the former testimony rule adopted by Congress and that, for that reason, Rule 804(b)(5) could not properly be adopted to circumvent Congress's decision that such testimony should not be admissible unless the accused had had an opportunity to examine or cross-examine the declarant. That is a view that had been applied in two circuits. See *United States v. Barrett*, 598 F. Supp. 469, 482 (D. Me. 1984), *aff'd.*, 766 F.2d 609 (1st Cir.) (without discussion of the point), *cert. denied*, 474 U.S. 923 (1985), and *United States v. Vigoda*, 656 F. Supp. 1499, 1504-06 (D. N.J. 1987), *aff'd.*, 857 F.2d 1467 (3rd Cir. 1988) (without published opinion).

In this case the court of appeals adopted instead an interpretation of the other exceptions rule that has the apparent effect of conferring on the district courts in the Eleventh Circuit a discretion that Congress sought to deny them. *Deeb* at 8a-11a. Were this just an aberrant ruling, the problem might

not merit the Court's attention at this time; the opinion below, however, makes it clear that the meaning to be assigned the phrase "not specifically covered by any of the foregoing exceptions" presents a problem that has recurred in the courts of appeal and has given rise to a debate over what has been styled the "near miss" doctrine. Id. The recurrence of the problem and the existence of the debate reinforce the need for the Court to now provide guidance on the scope and proper interpretation of Rule 804(b)(5).

3. **The Court should grant review to clarify the circumstances in which former testimony given by an unavailable accomplice may be admitted and used against an accused under the Confrontation Clause.** The Court has regularly approved the admission of former testimony given by an unavailable declarant where the accused had the opportunity to confront the declarant and develop the testimony by examination or cross-examination at the hearing at which it was given. See, e.g., *California v. Green* and *Ohio v. Roberts*. The Court has never sanctioned the admission of an uncross-examined statement made by an unavailable accomplice-declarant after his or her arrest. See, e.g., *Douglas v. Alabama*, *Bruton v. United States*, *Lee v. Illinois*, and *Williamson v. United States*. The present case presents two issues that arise at the intersection of the principles established by those decisions.

In the present case, the district court admitted a post-arrest statement made by an accomplice-declarant in circumstances that enhanced the presumption of unreliability that attends such statements. The statement was made pursuant to a plea bargain. The declarant sought further benefits that could only be realized if the substance of his statement was viewed as providing valuable assistance to the government. The only valuable assistance the declarant could creditably provide was to impli-

cate the accused as a principal in the scheme alleged in the indictment. The court of appeals approved the admission of that statement on the ground that it was testimony which had been cross-examined by one who had adequately probed the declarant's motive to lie. The court of appeals held that this cross-examination provided indicia that the accomplice-declarant's testimony was reliable sufficient to satisfy the standard laid down by this Court in *Idaho v. Wright*. That decision poses an issue that the Court has not addressed directly -- namely, whether and to what extent cross-examination is properly viewed, for purposes of Confrontation Clause analysis, as a circumstantial guarantee of trustworthiness as opposed to a circumstantial guarantee of fairness?

It is clear that cross-examination conducted on behalf of an accused promotes reliability in the fact-finding process. It enables the accused to clarify ambiguities that might otherwise be created by the witness's testimony. It enables the accused to force the witness to confront and acknowledge factors that might call into question the reliability of his or her observations or memory. It enables the accused to develop testimony that is consistent with the defense's theory of the case. It enables the accused to confront the witness in the presence of the fact-finder with inconsistencies between the witness's statements from the stand and testimony or other evidence that has been or will be presented during the accused's trial. It enables the accused to develop and explore any factors that might motivate the witness to testify falsely.

Each of those attributes of cross-examination, properly used, aids the fact-finder in appraising the trustworthiness of a witness's statements and the weight they should be given. Where the witness is adverse to the accused, each of those attributes, properly used, can aid the accused in demonstrating

that assertions made by the witness that are harmful to the accused's case are unreliable and are particularly worthy of disbelief. None of those attributes, however, is designed or intended to generate indicia that an adverse witness's testimony is reliable or to provide particularized guarantees that it is trustworthy. That is not the function of confrontation and cross-examination of adverse witnesses in criminal cases.

Nonetheless, the former-testimony rule, as codified in Rule 804(b)(1), is a "firmly rooted" exception to the hearsay rule, and cross-examination by someone other than the accused does establish an intrinsic circumstance comparable to the circumstance that underlies the exception. It is the presence of that comparable circumstance that lends superficial plausibility to the lower court's view that the oath plus cross-examination probing the declarant's motive to lie provided "circumstantial guarantees of trustworthiness" "equivalent" to those provided by the circumstances embodied in the former-testimony exception codified in Rule 804(b)(1) and thus justified the admission of that testimony admission under Rule 804(b)(5).

The lower court's opinion does not, however, indicate that the panel adequately recognized that the intrinsic circumstances must also provide indicia of reliability amounting to particularized guarantees of trustworthiness sufficient to establish the declarant is particularly worthy of belief under the principles articulated in *Idaho v. Wright* in order to satisfy the requirements of the Confrontation Clause and fundamental fairness. Standing alone this would present an issue of sufficient import to the administration of the criminal justice system to merit the Court's attention. But that decision also presents a second and related constitutional issue that enhances the value of the present case as a vehicle for clarifying the circumstances in which former testimony given for the government by an unavailable

accomplice-declarant may be admitted against an one accused of a crime.

The Court's opinions construing the Confrontation Clause can fairly be read as implicitly establishing a clear and easily administered rule: former testimony given by an accomplice-declarant implicating an accused individual may only be admitted as evidence at the trial of the accused if the accused had an opportunity to confront the declarant and to develop the testimony by examination or cross-examination at the hearing at which it was given. In *Coy v. Iowa*, the Court reaffirmed that the Confrontation Clause secures a separable right of an accused to confront, as well as to cross-examine, the witnesses against him or her in the presence of the fact-finder. *Douglas*, *Bruton*, *Lee*, and *Williamson* have firmly established that post-arrest, accomplice-statements are inherently suspect and presumptively unreliable. *Green* and *Roberts* have established that former testimony given at a hearing at which the accused had a fair opportunity to confront the declarant and develop the testimony by cross-examination or its equivalent may be admitted without violating the Confrontation Clause or the requirements of fundamental fairness, even where there exist plausible grounds to question the reliability of that former testimony. Taken as whole, these cases may properly be viewed as establishing that it is the fact that the accused had the opportunity to confront the accomplice-declarant and develop the testimony given on the prior occasion to fit the accused's theory of the case that makes it fair and constitutionally permissible to admit the former testimony if the declarant is not available, without further inquiry into trustworthiness of the declarant or the testimony.

The persistence with which former-testimony cases have come before the federal courts suggests that this Court should

provide guidance on the constitutional constraints that those courts should observe in applying Rules 804(b)(1) and (5) in such cases. In the present case, the court of appeals undertook this task and adopted a rule that would authorize admission of an unavailable declarant's former testimony that had been cross-examined by someone other than the accused in many criminal cases. The breadth of that holding and its potential consequences for the conduct of trials in the federal courts, and its apparent conflict with Congress's expressed intent, reinforce the reasons why the Court should grant review in this case.

4. **The Court should grant review because the rule announced by the court below will have a significant effect upon the conduct of civil as well as criminal trials in federal district courts.** The court below carefully articulated a precise holding:

> ... [W]e conclude that when testimony offered under the residual hearsay exception has been subject to cross-examination by someone other than the defendant, that cross-examination serves as the functional equivalent of cross-examination by the defendant if two conditions are met: 1) the cross-examination probed the witness's motive or inducement to lie; and, 2) the defendant has not shown that the absence of an opportunity to personally cross-examine the witness deprived him of an opportunity to present evidence that would have undermined the probative value of the witness's testimony against the defendant.

Deeb at 17a.[6]

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[6] The opinion does not explain why the trial court's refusal to permit Deeb to testify to what Biamby had told Deeb that Biamby had said to the prosecutor and government agent did remove this case

That rule is different and broader than the former-testimony rule taht the Court submitted to Congress. It is not limited to cases in which the declarant was examined by a party with "motive and interest" similar to that of the accused.[7] It authorizes the admission of former testimony so long as the witness's motive to lie has been adequately probed. The barriers to admitting hearsay are less in civil cases because they are not subject to the constraints of the Confrontation Clause. For that reason, the rule announced below, if permitted to stand, is likely be applied in civil as well as in criminal cases. The application of that rule will significantly alter trial practice and inject a degree of uncertainty into the application of the former-testimony rule in both types of case. The Court should not permit that to occur without prior examination.

The potential consequences for criminal case are apparent. Many federal criminal cases allege criminal conduct involving multiple actors. Most involve multiple hearings at which testimony of potential witnesses may be taken. Many require more than one trial. Under the rule announced by the court of appeals, district courts would have discretion to admit former testimony given by an unavailable declarant at a proceeding at which the accused had not been present unless the accused could demonstrate that cross-examination was the only way he or she could have presented evidence essential to that accused's case. Here the court of appeals thought that the fact that Deeb could have testified or otherwise proved his prior relationship with Biamby and that his counsel could have confronted the

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from the rule the court of appeals announced.

[7] Indeed, in the present case, counsel for Cadavid would have had a strong motive to let all the blame be directed at the absent defendant, Deeb.

government agent with the inconsistencies between his and Biamby's accounts justified a finding that Deeb was not deprived of any meaningful rights by the admission of Biamby's former testimony. It is difficult to envision circumstances that would enable an accused to satisfy the standard requiring exclusion set by the court of appeals in this case.

The consequences for civil cases may well be more far-reaching. Many product liability claims, for example, involve multiple lawsuits against those involved in the design, manufacture, and distribution of the challenged product. All plaintiffs have reason to and typically will probe any factors that may motivate an expert or other non-case specific witness, such as the designer of the product, to testify to a biased account favoring the manufacturer. Similarly, the manufacturer and other defendants will have reason to cross-examine the experts and other non-case specific witnesses tendered by any plaintiff to develop factors that may undermine the reliability or probative value of the testimony those witnesses give. The lower courts have already confronted the problem. Too date, the use of Rule 804(b)(5) as a vehicle for admitting former testimony has been confined to the situation in which the parties to the prior action "had the same motive as the present defendants to subject [the declarant] to searching cross-examination and to raise any appropriate objections." *Daretz v. Fibreboard Corp.*, 765 F.2d 456, 462-63 (5th Cir. 1985).

Under the rule adopted below, the district courts would have discretion to admit the former testimony of experts and others who became unavailable after the first occasion on which they testified and were cross-examined at a subsequent trial or proceedings, without regard to privity or to similarity of motive and interest, so long as the declarant's motive to lie had been adequately probed and the court concluded that the other condi-

tions mandated by Rule 804(b)(5) had been satisfied. That is a step that might well be advocated by those who hold the view that the hearsay rule should be abolished or substantially liberalized. See, e.g., Christopher Mueller, *Post-Modern Hearsay Reform: The Importance of Complexity*, 76 MINN. L. REV. 367 (1992). Congress rejected that view, however. The Court should grant review to provide necessary guidance on the propriety and scope of the rule crafted below in light of the language and polices that Congress adopted.

CONCLUSION

The Court should issue a writ of certiorari to review the judgment of the court of appeals in this case for the reasons developed above.

Respectfully submitted

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APPENDIX

BEST AVAILABLE COPY

In the
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-5253

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JEAN JOSEPH DEEB,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida.

Before CARNES, Circuit Judge, FAY* and JOHNSON, Senior Circuit Judges.

CARNES, Circuit Judge:

Jean Joseph Deeb was convicted of importation and possession of cocaine. At his trial, the evidence against him included testimony that a co-conspirator had given at a prior trial at which Deeb was neither present nor represented. We conclude that the testimony from the prior trial was admissible under the residual hearsay exception and that its admission did not violate the Confrontation Clause. Accordingly, we affirm Deeb's con-

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* See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

viction.

I. FACTUAL AND PROCEDURAL BACKGROUND

In August 1988, agents of the United States Customs Service inspected a coastal freighter that had recently arrived from Haiti at a Miami shipyard. They discovered a substantial quantity of cocaine in the freighter's forward ballast tanks. Assisted by agents of the United States Drug Enforcement Agency (DEA), Customs agents kept the freighter under continuous surveillance. They observed the freighter's crew transferring boxes from the freighter to a van. Agents followed the van to a duplex in northwest Miami where they saw two individuals unload some of the boxes and carry them into the duplex. The van, with the remaining boxes, was left parked outside.

The agents watched the duplex, the van, and any individual who had contact with either. Later, as several individuals attempted to leave with the van, the agents arrested seven individuals who had had significant contact with the van and the boxes. Deeb and Serge Biamby were among those arrested. The agents found a total of approximately 491 kilograms of cocaine in the boxes.

On August 31, 1988, a grand jury issued an indictment against all seven of those arrested. Deeb and Biamby were charged with knowingly and intentionally importing and conspiring to import cocaine, in violation of 21 U.S.C. §§ 2, 952(a), 960(a) (1) and (b), 963, and 18 U.S.C. § 2, and with knowingly and intentionally possessing with intent to distribute and conspiring to possess with intent to distribute cocaine, in violation of 21 U.S.C. §§ 841(a)(1), 846, and 18 U.S.C. § 2. The other five individuals were charged with related crimes arising from the same facts. Biamby and two other defendants

agreed to cooperate with the Government. Biamby pled guilty to one count of importing cocaine, in exchange for which the prosecutor agreed to dismiss the remaining charges against him and agreed that his cooperation could be used as a basis for a downward departure at sentencing Biamby was later sentenced to five years imprisonment and five years of supervised release.

Deeb and the remaining defendants were scheduled to stand trial in July 1989, but Deeb failed to appear. The Government moved to try him *in absentia* The district court denied the motion, severed the charges against Deeb, and proceeded with the trial against the remaining defendants. Biamby testified at that trial. Neither Deeb nor his counsel was present for any part of that trial.

In February 1990, authorities apprehended Deeb in the Dominican Republic and brought him to Miami for trial. Two months later the Government disclosed that Biamby was terminally ill with AIDS and was suffering progressive memory deterioration. The Government moved for permission to depose Biamby on videotape for the purpose of introducing the tape at Deeb's trial. Over Deeb's objection, the district court authorized the deposition, which was held on May 24, 1990. At the deposition, the Government questioned Biamby about Deeb's involvement in the crime, and Deeb, through counsel, cross-examined Biamby. On July 3, 1990, the Government filed a memorandum indicating that it would move at Deeb's trial to admit Biamby's testimony from the trial of the codefendants in July 1989.

Deeb was tried in December 1990. As part of its case against Deeb, the Government showed Biamby's videotaped deposition to the jury. Deeb did not object to the introduction of the videotaped deposition and, in this appeal, does not con-

tend that its admission was erroneous. During the presentation of its case against Deeb, the Government moved to introduce Biamby's direct examination testimony from the July 1989 trial of the codefendants, and over Deeb's objection, the district court admitted that testimony. Because neither the Government nor Deeb moved to introduce Biamby's cross-examination testimony, from the former trial, that testimony was not admitted.

After the close of the evidence. The jury found Deeb guilty. The district court sentenced him to 270 months imprisonment and ten years of supervised release.

II. STANDARD OF REVIEW

This Court reviews a district courts admission of former testimony for abuse of discretion *United States v. Lang*, 904 F. 2d 618, 624 (11th Cir.), *cert. denied*, 498 U.S. 924 111 S.Ct. 305. 112 L.Ed. 2d 258 (1990).

III. DISCUSSION

The district court relied on Fed. R. Evid. 801(d)(I)(B), 804(b)(1), and 804(b)(5) as authority for allowing the Government to introduce Biamby's former testimony. Deeb argues that Biamby's testimony was not admissible under any of these rules and that its admission violated his rights under the Sixth Amendment's Confrontation Clause. We will address Deeb's evidentiary and constitutional challenges in turn.

A. RULE 801(d)(1)(B)

The district court apparently accepted the Government's argument that Biamby's former testimony was admissible at

Deeb's trial under Rule 80l(d)(l)(B) as a prior statement by Biamby that was consistent with his deposition testimony and that was offered to rebut Deeb's express charge of "recent fabrication or improper influence or motive." Rule 801(d))(1)(B) provides:

> (d) **Statements which are not hearsay**. A statement is not hearsay if--
>
> > (1) **Prior statement by witness**. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is ... (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.

Even assuming that the admission of Biamby's deposition testimony satisfied the requirement that Biamby "testif[y] at the trial," and that his former testimony was offered to rebut a charge of "recent fabrication or improper influence or motive," we conclude that it still was not admissible under Rule 801(d)(1)(B). That rule requires that Biamby have been "subject to cross-examination concerning the statement," and "the statement" in this case was the former trial testimony. The rule envisions a situation where the hearsay declarant is available at trial (or as here, at deposition) to be cross-examined about his prior consistent statement when it is introduced. Such a situation never arose in this case. Neither the Government nor Deeb questioned Biamby at the deposition about his former testimony, probably because at the time, the Government had not expressed any intention of offering Biamby's former testimony at Deeb's trial. The Government stated at oral argument

that it did not decide to offer Biamby's former testimony until after it had taken his deposition, and nothing in the record indicates otherwise. The Government did not notify Deeb of its intention until five weeks after the deposition had been completed, too late for Deeb to cross-examine Biamby about the former trial testimony. Because Biamby was not subject to cross-examination about his former testimony and because the declarant being "subject to cross-examination concerning the statement" is a predicate for admission under Rule 801(d)(1)(B), that rule cannot justify admission of Biamby's former testimony.

B. RULE 804(b)(1)

The district court also relied on Rule 804(b)(1) as authority for admitting Biamby's former testimony at Deeb's trial. That rule provides:

> (b) **Hearsay exceptions**. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> > (1) **Former testimony**. Testimony given as a witness at another hearing of the same or a dif-ferent proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to deve-lop the testimony by direct, cross, or redirect examination.

Rule 804(b)(1) clearly requires that Deeb have had an opportu-

nity to cross-examine Biamby at the codefendants' trial. Deeb had no such opportunity.

The district court concluded that the cross examination of Biamby by Deeb's codefendants satisfied the requirement that Deeb have had an opportunity to cross-examine Biamby. That conclusion is contrary to the plain words of the rule that condition admissibility upon "the party against whom the testimony is now offered" having had an opportunity to develop the testimony through cross-examination or otherwise. At least as to criminal cases, Rule 804(b)(1) neither states nor implies that it is sufficient that another party with similar interests cross examined the witness at the prior trial. The Government has not cited any decision of any court so construing the rule and absent controlling authority, we will not place upon the rule a construction contrary to its plain wording. *See, e.g., North Dakota v. United States*, 460 U.S. 300, 312, 103 S.Ct. 1095. 1102, 75 L.Ed.2d 77 (1983); *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980). Thus, because Deeb had no opportunity to develop Biamby's former testimony through cross examination, Rule 804(b)(1) did not authorize admission of that testimony.

The Government contends that by fleeing before the trial in July 1989, Deeb waived his right to cross-examine Biamby. Deeb contends that the Government's argument is contrary to the Supreme Court's recent holding in *Crosby v. United States*, __ U.S. __, 113 S.Ct. 748, 122 L.Ed.2d 25 (1993). In *Crosby*, the Court unanimously held that Fed. R. Crim. P. 43 prohibits the trial *in absentia* of a defendant not present at the beginning of the trial, because the Court was unwilling to impute to a defendant who flees before trial the knowledge that he was waiving his right to be present at trial. *Id.* __ U S. at

__, 113 S.Ct. at 752. Deeb contends that under the Court's reasoning in *Crosby*, it would be impossible to impute to a defendant the knowledge that by fleeing before trial, he had waived his right recognized by Rule 804(b)(1) to cross-examine the witnesses against him. We agree.[1]

C. RULE 804(b)(5)

The district court suggested that Biamby's former testimony was admissible under the residual hearsay exception in Rule 804(b)(5), which provides for admission of hearsay statements satisfying the following requirements.

> **(5) Other exceptions.** A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purpose of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance to the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his

1. We express no opinion about whether the waiver question might be answered differently if Deeb had fled in order to gain a strategic advantage from the death of an ailing witness. The Government has conceded that there is no evidence to indicate that when he fled Deeb knew that Biamby was dying.

intention to offer the statement and the particulars of it, including the name and address of the declarant.

Deeb contends that Rule 804(b)(5) cannot authorize admission of Biamby's former testimony because Biamby's former testimony is not "a statement not specifically covered by any of the foregoing exceptions." Deeb contends that Biamby's former testimony is "specifically covered by" Rule 804(b)(1) but is not admissible under that rule. Deeb's position has been characterized elsewhere as the near-miss argument," which maintains that a hearsay statement that is close to, but that does not fit precisely into a recognized hearsay exception is not admissible under Rule 804(b)(5). *See Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F. Supp. 1190, 1262-63 (E.D.Pa. 1980), *affd. in part on other grounds and rev'd. in part, In re Japanese Elec. Products Antitrust Litig.*, 723 F.2d 238, 302 (3d Cir. 1983), *rev'd. on other grounds. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 580, 106 S.Ct. 1348, 1352, 89 L.Ed.2d 538 (1986).

This Court rejected the near-miss argument in *United States v. Fernandez*, 892 F.2d 976, 981 (llth Cir. 1990), *cert. dismissed* 495 U.S. 944, 110 S.Ct 2201, 109 L.Ed. 2d 527 (1900). In *Fernandez*, we addressed the propriety of admitting grand jury testimony under Rule 804(b)(5). *See* 892 F.2d at 980-84. The district court had relied on that rule in permitting the government to introduce, at the defendants' trial, the testimony of a witness who had died from natural causes five months after testifying before the federal grand jury that had indicted the defendants. *Id.* at 980. On appeal from their convictions, the defendants contended that grand jury testimony is never admissible under Rule 804(b)(5) because it is not "[a] statement not specifically covered by any of the foregoing exceptions." *Id* at 981. They argued that grand jury testimony

satisfies the definition of former testimony in Rule 804(b)(1) and, therefore, is a statement "specifically covered by" Rule 804(b)(1), even if it is not admissible under that rule because the defendants had no opportunity to cross-examine the witness at the grand jury proceeding. *Id.* This Court rejected the defendants' argument, stating:

> We decline to rally behind appellants' call for a *per se* ban on the admission of grand-jury testimony under the residual exception. If a statement does not satisfy all of the requirements of Rule 804(b)(1), then it is not a statement "covered by [one] of the foregoing exceptions" within the meaning of Rule 804(b)(5). We consider admissible those statements that are similar though not identical to hearsay clearly admissible those statements that are similar though not identical to hearsay clearly falling under one of the four codified exceptions, if the statements otherwise bear indicia of trustworthiness equivalent to those exceptions. The contrary reading would create an arbitrary distinction between hearsay statements that narrowly, but conclusively, fail to satisfy one of the formal exceptions, and those hearsay statements which do not even arguably fit into a recognized mold. If the proponent can show that a particular piece of hearsay carries "circumstantial guarantees of trustworthiness" equivalent to one of the four codified exceptions, that statement should be admissible regardless of its affinity to a statement falling squarely within a codified exception.

Id. at 981 (footnote omitted).

The Fourth Circuit recently relied on our *Fernandez* deci-

sion in rejecting a defendant's near-miss argument against admission under Rule 804(b)(5) of suppression-hearing testimony which, like grand jury testimony, is a type of former testimony dealt with in Rule 804(b)(1). See *United States v. Clarke*, 2 F.3d 81 (4th Cir. 1993). The *Clarke* court, reasoned that "'specifically covered" means exactly what it says: if a statement does not meet all of the requirements for admissibility under one of the prior exceptions, then it is not 'specifically covered.'" *Id* at 83 (citing *Fernandez*, 892 F.2d at 981); *see also* Myrna S. Reader. *Confronting the Catch Alls: Residual Clauses Also Benefit the Defense,* 6 Crim. Just. 31, 33 (1991) (concluding that the "not specifically covered" language of Rule 804(b)(5) has not been used to limit that exception to statements that are not addressed in another category). In light of *Fernandez*, we reject Deeb's near-miss argument.

Deeb's only other challenge to the admissibility of Biamby's former testimony under Rule 804(b)(5) is that it lacked the "equivalent circumstantial guarantees of trustworthiness" necessary for admission under that exception.[2] For reasons discussed below regarding the admissibility of Biamby's former testimony for purposes of the Confrontation Clause, we conclude that Biamby's former testimony possessed sufficient circumstantial guarantees of trustworthiness for admission under the residual hearsay exception. *Cf. United States v. Chapman*, 866 F.2d 1326, 1331 n. 1 (llth Cir. 1989) ("[T]he contours of the hearsay rule and the Confrontation Clause are

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[2] Rule 804(b)(5) requires the proponent of a statement offered under that exception to provide the adverse party with notice "sufficiently in advance of the trial...to provide the adverse party with a fair opportunity to prepare to meet it." Deeb did not object at trial to the adequacy of the Government's notice of its intention to offer Biamby's former testimony, nor has he raised any question about it on appeal.

not wholly congruent. However, they clearly protect similar values, and thus analysis under the two provisions will unavoidably involve similar factors." (citations omitted)).

D. THE CONFRONTATION CLAUSE

Deeb argues that the admission at his trial of Biamby's former testimony violated Deeb's rights under the Confrontation Clause of the Sixth Amendment. That Clause provides: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him...." U.S. Const. Amend. VI. The Clause accords criminal defendants a "constitutional right to cross-examine adverse witnesses." *United States v. Chapman*, 866 F.2d 1326, 1330 (llth Cir. 1989); *accord Ohio v. Roberts*, 448 U.S. 56, 63, 100 S.Ct. 2531. 2537, 65 L.Ed.2d 597 (1980). "However, the right to confrontation is not absolute." *Chapman*, 866 F.2d at 1330. The admission of hearsay against a defendant deprives the defendant of an opportunity to confront the declarant, but when such a statement satisfies two requirements, the absence of an opportunity for confrontation is not unconstitutional. *Roberts*, 448 U.S. at 64-65, 100 S.Ct. at 2538. The two requirements are, first, that the prosecution establish that the hearsay declarant is unavailable, *id.* at 65, 100 S.Ct. at 2538, and, second, that the prosecution establish that the hearsay statement bean the "indicia of reliability" necessary "'to afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement.'" *Id.* at 65-66, 100 S.Ct. at 2539 (quoting *Mancusi v. Stubbs*, 408 U.S. 204, 213, 92 S.Ct. 2308, 2313, 33 L.Ed.2d 293 (1972) (citations omitted)). The second requirement reflects the purpose of the Confrontation Clause "to augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence." *Roberts*, 448 U.S. at 65, 100 S.Ct. at 2539.

The Supreme Court has determined that the indicia of reliability requirement is satisfied when the evidence at issue falls within one of the firmly rooted hearsay exceptions. *Id.* at 66, 100 S.Ct at 2539. Assuming that no such exception applies here, we instead will decide whether Biamby's former testimony exhibited the indicia of reliability necessary for admission under the residual hearsay exception. Rule 804(b)(5).[3] The Supreme Courts has stated that evidence offered under that exception is presumptively unreliable, *Lee v. Illinois*, 476 U.S. 530, 543, 106 S.Ct. 2056, 2063, 90 L.Ed.2d 514 (1986), and "must be excluded, at least absent a showing of particularized guarantees of trustworthiness." *Roberts*, 448 U.S. at 66, 100 S.Ct. at 2539. Such particularized guarantees of trustworthiness must, like the circumstantial guarantees of trustworthiness necessary for admission under the hearsay exceptions, "be drawn from the totality of the circumstances that surround the making of the statement and that render the declarant particularly worthy of belief." *Idaho v. Wright*, 497 U.S. 805, 820, 110 S.Ct. 3139, 3149, 111 L.Ed.2d 638 (1990); *accord United States v. Accetturo*, 966 F.2d 631, 634 (11th Cir.1992), *cert. denied*, __U.S.__, 113 S.Ct. 1053, 122 L.Ed.2d 360 (1993). Also, the Supreme Court has held that "evidence corroborating the truth of a hearsay statement" is not relevant to a finding of trustworthiness. *Wright*, 497 U.S. at 822, 110 S.Ct. at 3150.

---

[3] The Government contends for the first time on appeal that Biamby's former testimony was admissible under Rule 804(b)(3), authorizing admissions of statements against interest, because Biamby's former testimony inculpated him in the conspiracy to import cocaine. The Government's belated Rule 804 (b)(3) contention raises difficult issues, *compare United States v. Gabay*, 923 F.2d 1536 (11th Cir. 1991), with *United States v. Gonzalez*, 599 F.2d 1271, 1273 (5th Cir. 1977), and *United States v. Atkins*, 618 F.2d 366, 372 (5th Cir. 1980), which we need not resolve in light of our holding that Biamby's former testimony is admissible under Rule 804-(b)(5)

The Government has pointed out three facts about Biamby's former testimony that it contends are guarantees of trustworthiness: Biamby gave the former testimony under oath; his testimony was self-inculpating; and his testimony was subject to cross-examination by Deeb's original codefendants.

As the Government acknowledges, the mere fact that a statement is made under oath is not enough to guarantee its trustworthiness. *See United States v. Lang*, 904 F.2d 618, 623 (llth cir.), *cert. denied*, 498 U.S. 924, 111 S.Ct. 305, 112 L.Ed.2d 258 (1990). Likewise, the fact that Biamby's testimony was self-inculpating is no guarantee of trustworthiness under the circumstances. Though self-inculpating, Biamby's testimony was not against his interest because, at the time he testified, Biamby had already pled guilty to one count of conspiracy to import cocaine and, in exchange for his cooperation with the prosecution of his alleged co-conspirators, the Government had agreed to dismiss the remaining counts against Biamby and to use his cooperation as a basis for a downward departure at sentencing. Biamby had a strong motive to testify in a manner that would win him favor with the Government, and he could achieve that goal by inculpating Deeb as the principal conspirator in the cocaine importation scheme. *Cf. United States v., Gonzalez*, 559 F.2d 1271, 1273 (5th Cir. 1977) (holding that the pressure put on a co-conspirator, who had been convicted and granted immunity from further prosecution, to testify before a grand jury that indicted the defendant, made the giving of the testimony in the co-conspirator's best interest and therefore not a statement against interest). As the Sixth Circuit has stated:

> A long line of Supreme Court cases interpreting the Confrontation Clause has created a strong presumption against the trustworthiness of co-conspirators' state-

> ments that are made after the conspiracy has terminated in arrest .... Due to a coconspirator's "strong motivation to implicate the defendant and to exonerate himself," a co-conspirator's statements about the defendant's involvement in the crime should be viewed with "special suspicion." This suspicion stems from the "reality of the criminal process, namely, that once partners in a crime recognize that the 'jig is up,' they tend to lose any identity of interest and immediately become antagonists, rather than accomplices."

United States v. Gomez-Lemos, 939 F.2d 326, 329-30 (6th Cir. 1991) (citations omitted) (quoting *Lee*, 476 U.S. at 541, 544-45, 106 S.Ct. at 2062, 2063-64).

The remainder of our analysis focuses on the codefendants' cross-examination of Biamby. As previously indicated, their cross-examination was not introduced in evidence at Deeb's trial. For this reason, Deeb contends that this Court should not consider the fact that the codefendants cross-examined Biamby. He argues that Biamby's testimony should be treated as a grand jury witness's testimony. He points out, correctly, that this Court has yet to hold that any of the grand jury testimony it has reviewed had particularized guarantees of trustworthiness. See, *e.g.*, *Lang*, 904 F.2d at 622-23 (llth Cir.); *Fernandez*, 892 F.2d at 982-83 (concluding that, even though Rule 804(b)(5) does not prohibit the admission of grand jury testimony thereunder, we would admit "only extraordinarily trustworthy grand-jury testimony ... as proof of the matter asserted" and we would not "sanction admission of proffered grand-jury testimony if its trustworthiness and reliability were open to troubling

doubt").[4] Also in Deeb's favor, the Supreme Court has generally held the uncross-examined statement of an alleged co-conspirator insufficiently trustworthy for admission under the Confrontation Clause. *See. e.g., Lee*, 476 U.S. at 541, 106 S.Ct. at 2062 (holding inadmissible against the defendant his co-conspirator's confession on the ground that the co-conspirator was not available for cross-examination); *Bruton v. United States*, 391 U.S. 123, 136, 88 S. Ct. 1620, 1628, 20 L.Ed.2d 476 (1968) (same). Thus, were we to treat Biamby's former testimony as though it has not been subject to cross-examination, we probably would hold its admission to be error.

However, Biamby was cross-examined by Deeb's codefendants at their trial. That cross-examination was available to Deeb who deliberately chose not to introduce it. We cannot allow a defendant to render former testimony inadmissible by the simple expedient of electing not to afford himself of the benefit of crossexamination that occurred when the testimony was taken. Deeb's contrary position would render Rule 804(b)(1) useless, and it is tantamount to saying that the prosecution cannot offer any testimony, even live testimony, against a defendant unless he deigns to cross-examine the witness. We refuse to accept such an absurd position. Instead, we turn to the task of deciding whether the cross-examination of Biamby that was available to Deeb rendered Biamby's testimony sufficiently trustworthy under the Confrontation Clause had Deeb chosen to utilize that cross-examination.

---

[4] This Court appears to have considered independent corroborating evidence in deciding *Fernandez* and *Lang*, both of which were decided before *Wright*. To the extent that those decisions turned on the existence of independent corroborating evidence, their analysis is inconsistent with *Wright*, 497 U.S. at 818, 110 S.Ct. at 3148.

The principal purpose of cross-examination is:

> to challenge "whether the declarant was sincerely telling what he believed to be the truth, whether the declarant accurately perceived and remembered the matter he related, and whether the declarant's intended meaning is adequately conveyed by the language he employed."

Roberts, 448 U.S. at 71, 100 S.Ct. at 2541 (citation omitted). In light of this purpose, we conclude that when testimony offered under the residual hearsay exception has been subject to cross-examination by someone other than the defendant, that cross-examination serves as the functional equivalent of cross-examination by the defendant if two conditions are met: 1) the cross-examination probed the witness's motive or inducement to lie; and, 2) the defendant has not shown that the absence of an opportunity to personally cross-examine the witness deprived him of an opportunity to present evidence that would have undermined the probative value of the witness's testimony against the defendant.

Deeb contends that the codefendants' cross-examination was not adequate to demonstrate Biamby's motive to lie about Deeb's involvement in the cocaine importation conspiracy. Deeb points out that Biamby had a motive to minimize his own role in the scheme to import cocaine by implicating Deeb as a principal. Deeb testified at his trial that he and Biamby were friends, that they had had legal business dealings in the past, and that, at the time of their arrest, Deeb was accompanying Biamby on a legitimate errand. Deeb argues that Biamby's testimony at the trial of the codefendants was a fabrication in which Biamby placed Deeb in the role actually played by Biamby in the conspiracy to import cocaine. Deeb contends that the

codefendants had no motive to cross-examine Biamby about his allegedly false implication of Deeb as a principal in the importation scheme.

Although we recognize that the codefendants did not have precisely the same objectives as Deeb for discrediting Biamby, we believe the objectives of at least one of the co-defendants were sufficiently similar to Deeb's that his cross-examination could and did probe Biamby's motive or inducement to lie. The transcript of the codefendants' trial reveals that Biamby was vigorously cross-examined by counsel for Abelardo Munera-Cadavid. Biamby's testimony implicated Cadavid, along with Deeb, as a principal conspirator in the importation scheme. In his cross-examination of Biamby, Cadavid's counsel established that Biamby had been heavily involved in narcotics trafficking since 1983 and that the terms of Biamby's plea agreement presented him with a strong motive to falsely inculpate Deeb and Cadavid. Also, Cadavid's counsel brought out the fact that Biamby had pled guilty to only one count of a five count indictment, each count of which carried a 15 to 40-year term of imprisonment, and that the Government had agreed to dismiss the remaining counts against Biamby if he cooperated by testifying. Cadavid's counsel asked Biamby the following about the consequences of his plea agreement:

> Q. So instead of looking at a potential of 240 years, anywhere from 90 to 240 years[,] by your coming into this court and testifying, you knocked that down [to] anywhere from 15 to 40 years, is that correct?
>
> A. Sir, this is my plea agreement.
>
> Q. Well, that's what your plea agreement says?

A. Yes, sir.

Q. And, as a matter of fact, it even goes further. It also states in your plea agreement -- I am referring to the 5th paragraph -- that ... the United States prosecutor ... has the right to evaluate and make decisions about how your testimony went, you are aware of that, aren't you, sir?

A. Yes, sir.

Q. And that the Government, the prosecutor [,] can come before the court and ask the judge to even give you less than the 15 years, depending on how you testify, is that correct?

A. Yes, sir.

Q. And you are aware in paragraph number 6 that the Government prosecutor has the right to make a recommendation as to the quantity and quality of your punishment. That's what it says there, is that correct?

A. Yes, sir.

Q. So obviously one of your motives is that you want to testify. You want to impress [the prosecutor]. You want to do a good job so that hopefully [the prosecutor] will come to court at the time of your sentencing and say, "Judge, Serge Biamby did a great job for us and we want you to go below 15 years." I mean, that's what you are hoping for, isn't that correct, in all fairness?

A. Yes.

* * *

Q. [I]f you don't testify the way that [the prosecutor] expects you to testify or if he's not happy with your testimony, you don't have an agreement, do you?

* * *

A. I have to help myself.

Q. Exactly. You have to do whatever is necessary to help yourself, to save you from doing a long prison sentence, isn't that correct?

A. No, sir. I am telling the truth.

Q. Yes, sir. And your motive for testifying today is to get the least possible jail sentence that you can get, isn't that correct?

A. It's part of it and at the same time, telling the truth, sir.

This cross-examination by Cadavid, which was available to Deeb, is sufficient to demonstrate Biamby's motive or inducement to lie. There is little or nothing Deeb could have added to that line of inquiry. The first prong of the test is satisfied.

The second part of our inquiry into the trustworthiness of Biamby's testimony concerns whether Deeb has shown that the absence of an opportunity to cross-examine Biamby cost Deeb an opportunity to present evidence to undermine the probative value of Biamby's testimony against him. Deeb maintains that he would have pursued five lines of questioning, not pursued by the codefendants, that would have undermined the probative

value of Biamby's testimony against him. Deeb contends he would have cross-examined Biamby regarding: (1) the legitimate nature of his business relationship with Biamby; (2) inconsistencies between Biamby's former testimony and testimony given by Customs Agent Gonzalez as to the events surrounding Deeb and Biamby's arrest; (3) details of the importation procedure described by Biamby; (4) a statement Biamby allegedly made to Deeb, after their arrest, that Biamby had told the Government that Deeb was innocent; and (5) Biamby's health. All of the evidence that Deeb sought to establish with the suggested lines of inquiry either was or could have been established through other means. First, Biamby admitted at the codefendants' trial that he had met Deeb sometime before Deeb allegedly approached him about importing cocaine. Although further inquiry might have elicited testimony from Biamby about the legitimate nature of his business relations with Deeb, there is no indication that such testimony would have conflicted in any way with Biamby's implication of Deeb as a principal in the cocaine importation conspiracy. Further, when Deeb had an opportunity at Biamby's deposition to inquire into the legitimate nature of their business relations, he posed no questions regarding those dealings. Second, any inconsistencies between Biamby's and Gonzalez's versions of the events surrounding Deeb and Biamby's arrest was readily apparent. Third, Deeb could have discredited Biamby's description of importation procedures through means other than cross-examination of Biamby. Fourth, Biamby's alleged statement that Deeb was innocent could likewise be introduced through means other than cross-examination of Biamby. Finally, Deeb questioned Biamby extensively about his health at the deposition, which was admitted at trial.

For these reasons, we conclude that the codefendants' cross-examination of Biamby afforded his former testimony the

particularized guarantees of trustworthiness required for admission under the Confrontation Clause.

IV. CONCLUSION

We conclude that Biamby's former testimony had circumstantial guarantees of trustworthiness necessary for admission under 804(b)(5) and that its admission did not violate Deeb's rights under the Confrontation Clause. Accordingly, we AFFIRM Deeb's conviction.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA

v.

JUDGMENT IN A CRIMINIAL CASE

JEAN JOSEPH DEEB
(Name and address of defendant)

Case Number
88-582-CR-Hoeveler

NEAL LEWIS, ESQ.
Attorney for Defendant

THE DEFENDANT ENTERED A PLEA OF:
[[ ] guilty [ ] nolo contendere] as to count(s)_____
and
[ ] not guilty as to count(s)_____

THERE WAS A:
[[ ] finding [x] verdict] of guilty as to count(s) 1, 2, 3, 5, & 6

THERE WAS A:
[[ ] finding [ ] verdict] of not guilty as to count(s)_____
[ ] judgement of acquittal as to count(s)_____
The defendant is acquitted and discharged as to this/these count(s).

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF: Conspiracy to import cocaine, in violation of Title 21, USC, Section 963, as to count one of Indictment. Importation of Cocaine, in violation of Title 21, USC, Section 952(a) & 960(a) (1),(b), as to count two of Indictment. Conspiracy to possess with intent to distribute Cocaine, in violation of title 21, USC, Section 846, as to count three of Indictment.

Possession with intent to distribute Cocaine, in violation of Title 21, USC, Section 841(a) (1) and 18:2, as to count five of Indictment. Possession with intent to distribute Cocaine, in violation of Title 18; USC, Section 841(a)(1), as to count six.

IT IS THE JUDGEMENT OF THIS COURT THAT: The defendant be committed to the custody of the Bureau of prisons for a term of 270 months as to counts 1, 2, 3, 5, and 6, to run concurrently with each other. IT IS FURTHER ORDERED that the defendant serve a supervised release period of 10 years as to counts 1, 2, 3, 5, & 6 to run concurrently with each other.

MICROFILM
Mar 28 1991
Southern District
Miami

In addition to any conditions of probabation imposed above, IT IS ORDERED that the conditions of probabtion set out on the reverse of this judgement are imposed.

CONDITIONS OF PROBATION

Where probation has been orderd the defendant shall:

(1) refrain from violation of any law (federal, state and local) and get in touch immediately with your probation officer if arrested or questioned by a law-enforcement officer;
(2) associate only with law-abiding persons and maintain reasonable hours;
(3) work regularly at a lawful occupation and support your legal dependants, if any, to the best of your ability. (When out of work notify your probation officer at once, and consult him prior to job changes);
(4) not leave the judicial district without permission of the

probation officer.

(5) notify your probation officer immediately of any changes in your place of residence;

(6) follow the probation officer's instructions and report as directed.

The court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

IT IS FURTHER ORDERED that the defendant shall pay a total special assessment of $ 250.00 pursuant to Title 18, U.S.C. Section 3013 for count(s) 1, 2, 3, 5, & 6 as follows:

IT IS FURTHER ORDERED THAT counts_____ are DISMISSED on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall pay to the United States attorney for this district any amount imposed as a fine, restitution or special assessment. The defendant shall pay to the clerk of the court any amount imposed as a cost of prosecution. Until all fines, restitution, special assessments and costs are fully paid, the defendant shall immediately notify the United States attorney for this district of any change in name and address.

IT IS FURTHER ORDERED that the clerk of the court deliver a certified copy of this judgement to the United States marshal of this district.

[x] The Court orders commitment to the custody of the Attorney General and recommends:

Court recommends Mariana, Florida

March 21, 1991
Date of Imposition of Sentence

/s/ Wm. H. Hoeveler
Signature of Judicial Officer

William M. Hoeveler, US District Judge
Name and Title of Judicial Officer

March 26, 1991
Date

FILED
U.S. COURTS OF APPEALS
ELEVENTH CIRCUIT
AUG 2 1994
MIGUEL J. CORTEZ
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-5253

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JEAN JOSEPH DEEB,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: CARNES, Circuit Judge, FAY* and JOHNSON, Senior Circuit Judges.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc

(Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/Ed Carnes
UNITED STATES CIRCUIT JUDGE

ORD-42

*See Rule 34-2 (b). Rules of the U.S. Court of Appeals for the Eleventh Circuit.

FILED
COURT OF APPEALS
ELEVENTH CIRCUIT
FEB 15 1994
MIGUEL J. CORTEZ
CLERK

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-5253

D.C. Docket No. 88-52-CR

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JEAN JOSEPH DEEB,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

Before CARNES, Circuit Judge, FAY* and JOHNSON, Senior Circuit Judges.

JUDGMENT

This cause came to be heard on the transcript of the record

from the United States District Court for the Southern District of Florida, and was argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby ord-ered and adjudged by this Court that the judgment of conviction of the said District Court in this cause be and the same is hereby AFFIRMED.

---

* *See* Rule 34-2(b), Rules of the U. S. Court of Appeals for the Eleventh Circuit.

Entered: February 15, 1994
For the Court: Miguel J. Cortez, Clerk

By: /s/Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: Aug 25 1994

Supreme Court, U.S.
FILED
JAN 9 1995
OFFICE OF THE CLERK

No. 94-785

In the Supreme Court of the United States

OCTOBER TERM, 1994

JEAN JOSEPH DEEB, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

JO ANN HARRIS
Assistant Attorney General

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Washington, D.C. 20530
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QUESTION PRESENTED

Whether the admission at petitioner's trial of the testimony of a co-conspirator from a prior trial comported with Fed. R. Evid. 804(b)(5) and the Confrontation Clause.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	14

TABLE OF AUTHORITIES

Cases:

Clarke v. *United States*, cert. denied, 114 S. Ct. 1194 (1994)	8-9
Coy v. *Iowa*, 487 U.S. 1012 (1988)	13
Idaho v. *Wright*, 497 U.S. 805 (1990)	12, 13
Japanese Electronic Products Antitrust Litigation, In re, 723 F.2d 238 (3d Cir. 1983), rev'd, 475 U.S. 574 (1986)	10-11
Lee v. *Illinois*, 476 U.S. 530 (1986)	12
Ohio v. *Roberts*, 448 U.S. 56 (1980)	6, 12, 13
Tucker v. *United States*, cert. denied, 113 S. Ct. 322 (1992)	9
United States v. *Clarke*, 2 F.3d 81 (4th Cir. 1993), cert. denied, 114 S. Ct. 1194 (1994)	10
United States v. *Donlon*, 909 F.2d 650 (1st Cir. 1990)	10
United States v. *Fernandez*, 892 F.2d 976 (11th Cir. 1989), cert. dismissed, 495 U.S. 944 (1990)	5, 10, 11
United States v. *Guinan*, 836 F.2d 350 (7th Cir.), cert. denied, 487 U.S. 1218 (1988)	10
United States v. *Tucker*, 956 F.2d 1163 (4th Cir.), cert. denied, 113 S. Ct. 322 (1992)	11
White v. *Illinois*, 112 S. Ct. 736 (1992)	12, 13
Williamson v. *United States*, 114 S. Ct. 2431 (1994)	14

Constitution, statutes and rules: Page

U.S. Const. Amend. VI (Confrontation Clause) 5, 12, 13
21 U.S.C. 841(a)(1) 2
21 U.S.C. 846 2
21 U.S.C. 952(a) 2
21 U.S.C. 963 2
Fed. R. Evid.:
Rule 102 10
Rule 801(d)(1)(B) 4
Rule 804(b) 9
Rule 804(b)(1) 4, 5
Rule 804(b)(1)-(4) 9
Rule 804(b)(1)-(5) 9
Rule 804(b)(3) 14
Rule 804(b)(5) 4, 5, 9, 10, 11, 12, 13, 14

Miscellaneous:

S. Rep. No. 1277, 93d Cong., 2d Sess. (1974) 10

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-785

JEAN JOSEPH DEEB, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 13 F.3d 1532.

JURISDICTION

The judgment of the court of appeals was entered on February 15, 1994. Pet. App. 29a-30a. A petition for rehearing was denied on August 2, 1994. Pet. App. 27a-28a. The petition for a writ of certiorari was filed on October 31, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on one count of importing cocaine, in violation of 21 U.S.C. 952(a); one count of conspiring to commit that offense, in violation of 21 U.S.C. 963; two counts of possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); and one count of conspiring to commit those offenses, in violation of 21 U.S.C. 846.[1] Petitioner was sentenced to 270 months' imprisonment, to be followed by ten years' supervised release. Pet. App. 23a-26a. The court of appeals affirmed. *Id.* at 1a-22a.

1. On August 18, 1988, agents of the U.S. Customs Service boarded a freighter at a shipyard in Miami, Florida. The freighter had just come from Haiti. The only cargo that the agents found on board was a large quantity of cocaine in the ship's ballast tanks. The agents left the cocaine there and set up surveillance of the freighter, assisted by agents of the Drug Enforcement Administration. Pet. App. 2a; Gov't C.A. Br. 3-4.

On August 20, 1988, a van drove up to the freighter, and members of the crew loaded cardboard boxes from the freighter into the van. The agents followed the van to a

---

[1] Petitioner was indicted along with six co-defendants. Three of his co-defendants—Gilberto Gomez-Gallego, Francillion Louis Jeune, and Serge Biamby—pleaded guilty before trial. His three other co-defendants were tried separately from petitioner after petitioner failed to appear on the day scheduled for trial. At that trial, co-defendant Abelardo Munera-Cadavid was convicted on the two conspiracy counts and on one count each of importing and possessing with intent to distribute cocaine; co-defendant Ulrisse Loubeau was convicted on one count of possessing with intent to distribute cocaine; and co-defendant Leana Altema was acquitted.

duplex in northwest Miami. Pet. App. 2a; Gov't C.A. Br. 4-5. At the duplex, co-defendants Francillion Louis Jeune and Leana Altema carried the boxes from the van into the house. Petitioner and co-defendant Serge Biamby arrived and then drove off in the van to meet co-defendant Abelardo Munera-Cadavid, who was driving a separate car. The agents stopped the two vehicles and arrested petitioner, Biamby, and Munera-Cadavid. The agents then searched the duplex and found approximately 491 kilograms of cocaine with a retail value of about $32 million. Gov't C.A. Br. 5-6.

2. After petitioner and his co-defendants were indicted, co-defendant Biamby agreed to plead guilty and cooperate with the government. Petitioner and his remaining co-defendants were scheduled to stand trial in July 1989. When petitioner failed to appear on the day of trial, the trial went forward against his co-defendants. At trial, Biamby testified and was cross-examined by the other co-defendants, but petitioner's counsel was not present. Pet. App. 2a-3a.

In February 1990, petitioner was arrested in the Dominican Republic and was returned to Miami for trial. In April 1990, the government moved for, and was later granted, leave to take a videotaped deposition of Biamby because he was terminally ill with AIDS and suffering progressive memory loss. In May 1990, Biamby was deposed; petitioner's lawyer was present at the deposition and questioned Biamby. Pet. App. 3a.

In December 1990, petitioner stood trial. At trial, the government showed the videotaped deposition of Biamby to the jury without objection by petitioner. The government also introduced, over petitioner's objection, Biamby's testimony on direct examination at the 1989 trial of petitioner's co-defendants. Neither side in-

troduced Biamby's testimony on cross-examination at the prior trial. Pet. App. 3a-4a.

3. On appeal, petitioner challenged the admission of Biamby's testimony from the prior trial. The court of appeals rejected that challenge and affirmed petitioner's conviction. Pet. App. 1a-22a.

The court of appeals first considered the admissibility of Biamby's prior testimony under the Federal Rules of Evidence. Pet. App. 4a-12a. The court determined that the prior testimony was not admissible under Fed. R. Evid. 801(d)(1)(B) as a prior consistent statement, "[b]ecause Biamby was not subject [at his deposition] to cross-examination about his former testimony." Pet. App. 6a. The court also determined that the prior testimony was not admissible under Fed. R. Evid. 804(b)(1) as the former testimony of an unavailable witness, because petitioner had not had an opportunity to cross-examine Biamby at the prior trial. Pet. App. 6a-8a.

The court of appeals upheld the admission of Biamby's prior trial testimony, however, under the residual hearsay exception in Fed. R. Evid. 804(b)(5). Pet. App. 8a-12a.[2] The court rejected petitioner's argument that

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[2] Fed. R. Evid. 804(b)(5) provides:

> **(b) Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> * * * * *
>
> **(5) Other exceptions.** A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these

the prior testimony was not admissible under Rule 804(b)(5) because it was "specifically covered by," though not admissible under, Rule 804(b)(1). The court observed that petitioner's argument "has been characterized elsewhere as the 'near-miss argument,' which maintains that a hearsay statement that is close to, but that does not fit precisely into[,] a recognized hearsay exception is not admissible under Rule 804(b)(5)." Pet. App. 9a. The court held that petitioner's argument was foreclosed by *United States* v. *Fernandez*, 892 F.2d 976, 981 (1989), cert. dismissed, 495 U.S. 944 (1990), in which the Eleventh Circuit had "rejected the near-miss argument." Pet. App. 9a.

Petitioner's "only other challenge to the admissibility of Biamby's former testimony under Rule 804(b)(5) [was] that it lacked the 'equivalent circumstantial guarantees of trustworthiness' necessary for admission under that exception." Pet. App. 11a. The court of appeals considered that challenge together with petitioner's Confrontation Clause challenge to the admission of the former testimony, noting that, although analysis of the two challenges was "not wholly congruent," it "involved similar factors." *Id.* at 11a-12a. For purposes of its analysis, the court assumed that the evidence was not admissible under "one of the firmly rooted hearsay exceptions." *Id.* at 13a. The court accordingly con-

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rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

sidered whether the evidence bore "particularized guarantees of trustworthiness." *Ibid.* (quoting *Ohio* v. *Roberts*, 448 U.S. 56, 66 (1980)).

The court of appeals held that Biamby's prior testimony had the "particularized guarantees of trustworthiness required for admission under the Confrontation Clause." Pet. App. 21a-22a. The court determined that such guarantees were afforded by "the co-defendants' cross-examination of Biamby" at the prior trial. *Id.* at 21a.[3] As an initial matter, the court rejected petitioner's contention that it could not consider the cross-examination of Biamby at the prior trial because it had not been introduced at petitioner's trial (*id.* at 16a):

> [Biamby's] cross-examination was available to [petitioner] who deliberately chose not to introduce it. We cannot allow a defendant to render former testimony inadmissible by the simple expedient of electing not to afford himself of the benefit of cross-examination that occurred when the testimony was taken.

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[3] The court observed that it was "not enough to guarantee * * * trustworthiness" that Biamby had testified under oath at the prior trial. Pet. App. 14a. The court further observed that, "[t]hough self-inculpating, Biamby's testimony was not against his interest because, at the time he testified, Biamby * * * had a strong motive to testify in a manner that would win him favor with the Government." *Ibid.* Noting that this Court "has generally held the uncross-examined statement of an alleged co-conspirator insufficiently trustworthy for admission under the Confrontation Clause," the court of appeals in this case focused on "whether the cross-examination of Biamby" conducted by petitioner's co-defendants at the prior trial, which "was available to [petitioner]" at his own trial, "rendered Biamby's testimony sufficiently trustworthy under the Confrontation Clause." *Id.* at 16a.

Instead, the court stated (*id.* at 17a):

> [W]hen testimony offered under the residual hearsay exception has been subject to cross-examination by someone other than the defendant, that cross-examination serves as the functional equivalent of cross-examination by the defendant if two conditions are met: 1) the cross-examination probed the witness's motive or inducement to lie; and, 2) the defendant has not shown that the absence of an opportunity to personally cross-examine the witness deprived him of an opportunity to present evidence that would have undermined the probative value of the witness's testimony against the defendant.

The court of appeals determined that both conditions were met here. As to the first condition, the court observed that Biamby was "vigorously cross-examined" about his motive to lie by co-defendant Munera-Cadavid. Pet. App. 18a. After setting out part of that cross-examination in the text of its opinion, *id.* at 18a-20a, the court stated that there was "little or nothing [petitioner] could have added to that line of inquiry." *Id.* at 20a. The court then addressed each line of questioning that petitioner claimed he would have pursued in cross-examining Biamby. It determined that "[a]ll of the evidence that [petitioner] sought to establish with the suggested lines of inquiry either was or could have been established through other means." *Id.* at 21a.[4]

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[4] Petitioner contended that he would have cross-examined Biamby about (Pet. App. 21a):

> (1) the legitimate nature of his business relationship with Biamby; (2) inconsistencies between Biamby's former testimony and testimony given by Customs Agent Gonzalez as to the events surrounding [petitioner's] and Biamby's arrest;

ARGUMENT

The court of appeals carefully considered and correctly rejected petitioner's Rule-based and constitutional challenges to the admission of Biamby's prior trial testimony. Moreover, its decision does not conflict with any decision of this Court or another court of appeals. Petitioner's challenge to the decision below presents the same issues that this Court recently declined to review in *Clarke* v. *United States*, 114 S. Ct.

> (3) details of the importation procedure described by Biamby; (4) a statement Biamby allegedly made to [petitioner], after their arrest, that Biamby had told the Government that [petitioner] was innocent; and (5) Biamby's health.

With regard to those lines of questioning, the court of appeals found (Pet. App. 21a):

> First, Biamby admitted at the co-defendants' trial that he had met [petitioner] sometime before [petitioner] allegedly approached him about importing cocaine. Although further inquiry might have elicited testimony from Biamby about the legitimate nature of his business relations with [petitioner], there is no indication that such testimony would have conflicted in any way with Biamby's implication of [petitioner] as a principal in the cocaine importation conspiracy. Further, when [petitioner] had an opportunity at Biamby's deposition to inquire into the legitimate nature of their business relations, he posed no questions regarding those dealings. Second, any inconsistencies between Biamby's and Gonzalez's versions of the events surrounding [petitioner's] and Biamby's arrest was [*sic*] readily apparent. Third, [petitioner] could have discredited Biamby's description of importation procedures through means other than cross-examination of Biamby. Fourth, Biamby's alleged statement that [petitioner] was innocent could likewise be introduced through means other than cross-examination of Biamby. Finally, [petitioner] questioned Biamby extensively about his health at the deposition, which was admitted at trial.

1194 (1994), and *Tucker* v. *United States*, 113 S. Ct. 322 (1992). Further review is likewise unwarranted here.

1. The court of appeals correctly held that Biamby's prior trial testimony was admissible under the residual exception to the hearsay rule in Fed. R. Evid. 804(b)(5). Pet. App. 8a-12a.

Rule 804(b) contains five subsections, Fed. R. Evid. 804(b)(1)-(5), each of which sets forth an exception to the hearsay rule that may apply when a declarant is unavailable. The first four subsections cover specific types of statements: former testimony; statements under belief of impending death; statements against interest; and statements of personal or family history. Fed. R. Evid. 804(b)(1)-(4). The fifth subsection provides that a "statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness" may be admitted if the statement is offered as a material fact, is more probative on the point on which it is offered than other reasonably available evidence, and the general purposes of the Federal Rules of Evidence are served by admission of the statement. Fed. R. Evid. 804(b)(5).

Petitioner argues that Biamby's statements were not admissible under Rule 804(b)(5) because they were "specifically covered by," even though not admissible under, the "foregoing" subsection addressing "former testimony." Nothing in the text of the Rule supports petitioner's "near miss" argument. On the contrary, the most natural reading of the text supports the court of appeals' view in this case that a statement is "specifically covered by" subsections (1) through (4) of Rule 804(b) only if it meets the requirements for admission prescribed in one of those subsections. Pet. App. 9a.

Moreover, the court of appeals' rejection of the "near miss" argument is consistent with the overall purpose of the Rules to further the truth-seeking process. Fed. R. Evid. 102. Under the court of appeals' reading, subsection (5) serves the important purpose of allowing a court, on a case-by-case basis, to admit a statement into evidence, even though it does not fall within one of the first four subsections, if it has sufficient indicia of reliability.[5] By comparison, petitioner's "near miss" argument "would effectively render 804(b)(5) a nullity." *United States* v. *Clarke*, 2 F.3d 81, 83 (4th Cir. 1993), cert. denied, 114 S. Ct. 1194 (1994). More fundamentally, it would thwart the truth-seeking process that the Rules are designed to promote.

Accordingly, the Eleventh Circuit and other circuits have rejected the "near miss" argument. *United States* v. *Clarke*, 2 F.3d at 83; see also, *e.g.*, *United States* v. *Fernandez*, 892 F.2d 976, 981 (11th Cir. 1989), cert. dismissed, 495 U.S. 944 (1990); *United States* v. *Donlon*, 909 F.2d 650, 654 (1st Cir. 1990) ("we do not believe that the 'potential' availability of one kind of hearsay exception automatically rules out the use of another"); *United States* v. *Guinan*, 836 F.2d 350, 354 (7th Cir.), cert. denied, 487 U.S. 1218 (1988); *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238, 302 (3d Cir. 1983) ("the ['near miss'] theory puts the

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[5] The Senate Committee on the Judiciary explained that, "without a separate residual provision, the specifically enumerated exceptions could become tortured beyond any reasonable circumstances which they were intended to include." S. Rep. No. 1277, 93d Cong., 2d Sess. 19 (1974). The residual exception could not function as such a safety valve if courts were precluded from admitting a statement under that exception whenever the statement was arguably covered by another exception but failed to satisfy its requirements.

federal evidence rules back into the straightjacket from which the residual exceptions were intended to free them"), rev'd on other grounds, 475 U.S. 574 (1986). The court of appeals in this case properly rejected the argument as well.[6]

Petitioner errs in asserting (Pet. 16-18) that the court of appeals' decision gives district courts unduly broad discretion under the residual exception to the hearsay rule. The court of appeals upheld the admission of Biamby's prior testimony on quite narrow grounds. It emphasized that "the mere fact that [Biamby's] statement[s] [were] made under oath [was] not enough to guarantee [their] trustworthiness." Pet. App. 14a. Moreover, it placed little weight on the fact that the prior statements were "self-inculpating." *Ibid.* Instead, the court focused on "whether the cross-examination of Biamby that was available to [petitioner] rendered Biamby's testimony sufficiently trustworthy." *Id.* at 16a. The court identified one co-defendant whose objectives "were sufficiently similar to [petitioner's]

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[6] Petitioner urges this Court to grant review in this case to resolve a conflict among the circuits about the admissibility of grand jury testimony under Rule 804(b)(5). Pet. 14. This Court declined to resolve the asserted conflict in *United States* v. *Tucker*, 956 F.2d 1163 (4th Cir.) (Table), cert. denied, 113 S. Ct. 322 (1992). In any event, this case provides no opportunity to resolve the asserted conflict, because it does not involve the admission of grand jury testimony. Instead, it involves the quite different issue of the admissibility of prior trial testimony that was subject to cross-examination. Compare *United States* v. *Fernandez*, 892 F.2d at 981 (district court erred in admitting grand jury testimony under Rule 804(b)(5), because Eleventh Circuit "has never admitted any grand-jury testimony under the authority of Rule 804(b)(5)") with Pet. App. 15a-16a (distinguishing *Fernandez* on the ground that testimony in the present case was subject to cross-examination).

that his cross-examination could and did probe Biamby's motive or inducement to lie." *Id.* at 18a. The court determined that petitioner could have added "little or nothing * * * to that line of inquiry." *Id.* at 20a. In addition, the court specifically considered each of the lines of questioning that petitioner claimed he would have pursued, and it determined that "[a]ll of the evidence that [petitioner] sought to establish with the suggested lines of inquiry either was or could have been established through other means." *Id.* at 21a. In short, the court of appeals' careful and thorough analysis makes it clear that that court will not permit trial courts to rely on Rule 804(b)(5) indiscriminately.

2. The court of appeals was also correct in holding that the admission of Biamby's prior trial testimony did not violate petitioner's rights under the Confrontation Clause. Pet. App. 12a-22a.

This Court has held that an out-of-court statement by an unavailable declarant may be admitted into evidence without infringing the defendant's rights under the Confrontation Clause if the statement possesses adequate "indicia of reliability." *Ohio* v. *Roberts*, 448 U.S. 56, 66 (1980); see *Idaho* v. *Wright*, 497 U.S. 805, 814-815 (1990). Reliability concerns are satisfied, without more, if the statement fits within a "firmly rooted hearsay exception." *Ohio* v. *Roberts*, 448 U.S. at 66; see *White* v. *Illinois*, 112 S. Ct. 736, 743 (1992); *Idaho* v. *Wright*, 497 U.S. at 815. If the statement does not fit within such an exception, it may nevertheless be admitted if the government shows that it carries "particularized guarantees of trustworthiness." *Ohio* v. *Roberts*, 448 U.S. at 66; see *Lee* v. *Illinois*, 476 U.S. 530, 543 (1986). That determination must be made by considering "the totality of the circumstances * * * that surround the making of the statement and that

render the declarant particularly worthy of belief." *Idaho* v. *Wright*, 497 U.S. at 819; *Ohio* v. *Roberts*, 448 U.S. at 65-66. Because the residual hearsay exception is not a "firmly rooted" hearsay exception, a statement admitted under Fed. R. Evid. 804(b)(5) must possess particularized guarantees of trustworthiness to satisfy the Confrontation Clause.

As discussed above, the court of appeals correctly held, after carefully examining the totality of the circumstances, that Biamby's prior testimony bore sufficient guarantees of trustworthiness to satisfy the Confrontation Clause. *Idaho* v. *Wright*, *supra*. That factbound determination does not warrant further review.

Petitioner's reliance (Pet. i-ii, 11, 14, 22) on *Coy* v. *Iowa*, 487 U.S. 1012 (1988), is misplaced. The defendant in that case was charged with sexually assaulting two 13-year-old girls. *Id.* at 1014. At trial, the two girls testified behind a screen that kept the defendant from fully seeing them. *Id.* at 1014-1015. The Court held that that procedure violated the Confrontation Clause. *Id.* at 1020-1022. The Court did not, however, address the quite different situation presented here: *i.e.*, the admission under the residual hearsay exception of the testimony of an unavailable declarant from a prior trial. Cf. *White* v. *Illinois*, 112 S. Ct. at 743-744 (distinguishing the in-court procedural issues addressed in *Coy* from the requirements for admitting an out-of-court declaration under the Confrontation Clause). To the extent that petitioner relies on *Coy* to assert a right physically to confront Biamby at trial, he cannot establish that he was deprived of that right. Petitioner, like his co-defendants, had an opportunity to confront Biamby at the trial scheduled for July 1989. Petitioner, however, chose to forgo that opportunity by deliberately failing to appear for the trial.

Petitioner's reliance (Pet. 11, 13, 19, 22) on *Williamson* v. *United States*, 114 S. Ct. 2431 (1994), is likewise misplaced. In *Williamson*, this Court "clarif[ied] the scope" of Rule 804(b)(3), which permits the admission of statements against interest. *Id.* at 2433. The Court held that Rule 804(b)(3) required a "fact-intensive inquiry" to determine whether each portion of the statements by an accomplice of the defendant "was truly self-inculpatory." *Id.* at 2437 (opinion of O'Connor, J.). The Court noted, however, that if the accomplice's statements did not meet the requirements of Rule 804(b)(3), they might still be admissible under the residual exception of Rule 804(b)(5). *Id.* at 2437 n.*. Thus, nothing in *Williamson* casts doubt on the correctness of the decision below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Supreme Court, U.S.
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No. 94-785

In the

SUPREME COURT OF THE UNITED STATES

October Term 1994

JEAN JOSEPH DEEB,
petitioner,

v.

UNITED STATES OF AMERICA,
respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITIONER'S REPLY

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7 pp

TABLE OF CONTENTS

REPLY 1

CONCLUSION 5

TABLE OF AUTHORITIES

Cases

Bruton v. United States, 391 U.S. 123 (1968) 3

Coy v. Iowa, 487 U.S. 1012 (1988) 3,4

Idaho v. Wright, 497 U.S. 805 (1990) 5

Lee v. Illinois, 476 U.S. 530 (1986) 3

United States v. Clarke, 2 F.3d 81 (4th Cir. 1993),
cert. denied, 114 S. Ct. 1194 (1994) 4

United States v. Tucker, 965 F.2d 1163 (4th Cir.),
cert. denied, 113 S. Ct. 322 (1992) 4

Williamson v. United States,
114 S. Ct. 2431 (1994) 3

Constitutional and Statutory Provisions

U.S. Const., amend. VI (Confrontation Clause) 3

Federal Rules of Evidence

Rule 804(b)(1) 2,4
Rule 804(b)(5) 2,4,5

In the
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JEAN JOSEPH DEEB,
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REPLY

Three points in the Brief of the United States in Opposition merit reply:

1. Although doubtless inadvertent, the Brief in Opposition misstates the facts at one point in a way that is material. At no time was petitioner Deeb (or Biamby) in the van that contained the drugs. *All* accounts given agree that Deeb was the driver of the white Jeep Cherokee throughout, including the account given at pages 5-6 in the Brief for the United States filed in the Court of Appeals. At no point prior to his arrest did Deeb get out of the Jeep while it was at or near the duplex apartment. The arrest occurred when *Gomez-Gallago*, the passenger who had been in the Jetta with Cadavid, got into the van and began to drive it away from the duplex apartment, where it had been parked without being occupied or moved since its arrival and the initial unloading. The testimony of Deeb, Biamby, and the government agents who observed the events were consistent on these points. The assertion at the top of page 3 of the Brief in Opposition is wrong and cannot be supported from the record.

Counsel for petitioner notes this error to eliminate the

possibility that the Court might be misled about the significance of Biamby's former testimony. Apart from that testimony, the evidence against Deeb was entirely circumstantial. The government's case against him was largely a "mere presence and association" case. The only other evidence supporting an inference that Deeb was a participant in the alleged schemes was Agent Gonzalez's testimony that Deeb had spoken with the occupants of the Jetta and the evidence of Deeb's pre-trial "flight". The government acknowledged at trial that the former testimony was central to its case and made no claim on appeal that any error in its admission could viewed as harmless. The issues presented by the petition will be properly before the Court for decision if review is granted in this case.[1]

2. The government misperceives the nature of the arguments advanced by petitioner in at least three respects.

a. Given the legislative history as well as the language of Rules 804(b)(1) and 804(b)(5), petitioners argument that Rule 804(b)(5) could not properly be used by the courts to evade Congress's reasoned decision to reject the former testimony rule in the form submitted by the Court was a "direct hit" rather than a "near miss" argument. See Pet. at 7-10, 16-19; cf. Opp. at 8-11. That the court of appeals in this case

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[1] There is a further point that should, in fairness, be noted. Mr. Deeb has maintained his innocence throughout. In the trial court he took the stand. He explained his association with Biamby and his presence on the day. He explained his flight. He denied that it had been him who had spoken with the occupants of the Jetta and, given the circumstances of Agent Gonzalez's surveillance, his denial was plausible. The government was and is entitled to have the evidence viewed most favorably to the verdict; it is not, however, entitled to more. The possibility that an innocent man may have been sentenced to serve more than 22 years in prison may not be relevant to the decision whether the case merits review by the Court; but the potential consequences of an error of the kind presented here surely are.

sought to utilize evolving "near miss" doctrine to avoid the effect of a clear congressional directive enhances the importance of this case and emphasizes the need for this Court to provided guidance on the scope of the "Other Exceptions" authorized by Rule 804(b)(5).

b. Biamby was an alleged accomplice. He gave his testimony pursuant to a plea bargain. He sought future benefits that depended upon the government's appraisal of the value of his testimony. Those were the circumstances in which his former testimony was given and which gives this case its constitutional importance. This Court has consistently rejected any decision that authorized the admission of hearsay statements made by an unavailable accomplice-declarant after his or her arrest. The government's Brief in Opposition ignores the specific circumstances which makes this case constitutionally important and which create an apparent conflict between the decision below and the principles this Court declared and applied in *Bruton v. United States*, 391 U.S. 123 (1968), and *Lee v. Illinois*, 476 U.S. 530 (1986), and recently reaffirmed in *Williamson v. United States*, 114 S. Ct. 2431 (1994). See Pet. at 19-23; cf. Opp. at 12-14.

c. Petitioner did not rely "on *Coy [v. Iowa]* to assert a right to confront Biamby at trial." Opp. at 13. He suggested and reiterates that this Court's decisions construing the Confrontation Clause could "fairly be read as establishing a clear and easily administered rule: former testimony given by an accomplice-declarant implicating an accused may only be admitted as evidence at the trial of the accused if the accused had an opportunity to confront the declarant and to develop the testimony by examination or cross-examination at the hearing at which it was given." Pet. at 22. *Coy v. Iowa*, 487 U.S. 1012 (1988), was cited solely to develop the foundation for that point. Id. The Brief in Opposition does not address the point or the foundation; instead it appears to use that reference

(Opp. at 13) as a vehicle for reintroducing a modified version of the waiver argument urged below, an argument that the court of appeals correctly rejected (App. 7a-8a and note 1), a ruling that the government has not challenged here.

3. The government accurately reports that the issues presented in this case are similar to those decided in *United States v. Clarke*, 2 F.3d 81 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1194 (1994). In contrast the view suggested by the government, Petitioner submits that the fact that the question whether, and if so, in what circumstances, former testimony may be admitted under Rule 804(b)(5), when it is inadmissible under Rule 804(b)(1) or any of the other "firmly rooted" exceptions to the hearsay rule, is a recurring question enhances, rather than diminishes, the importance of the issues presented here.[2]

Moreover, the constitutional issues presented here differ from those presented in *Clarke* in ways that enhance their suitability for review by the Court. The accomplice-declarant in *Clarke* was the accused's brother. He had given the challenged testimony at a hearing on a suppression motion in a case that the government had brought against him alone. He neither sought nor could have gained a benefit from testifying against his brother. He was unavailable because he refused to

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[2] The unpublished disposition in *United States v. Tucker*, 965 F.2d 1163 (table), 1992 Westlaw 44813 (4th Cir. 1992), reinforces the conclusion that the Court should address the underlying issue promptly. There the United States Court of Appeals for the Fourth Circuit upheld the admission of immunized, accomplice grand jury testimony under Rule 804(b)(5). The decision suggests that that court now views its position on an issue that has long divided the circuits as so firmly established that decisions on the point do not merit publication. Maintaining confidence in the integrity of the federal court system suggests that the Court can not long defer acting to resolve the conflict.

testify against his brother at the brother's trial. In that case, it was the lack of motive to lie and indicia of reliability other than the presence examination and cross-examination by the parties to the prior action which the court of appeals analyzed and emphasized in its opinion. Those circumstance made it possible for the court to engage an analysis of the circumstances that paralleled the apparent mandate of *Idaho v. Wright*, 497 U.S. 805 (1990). Those circumstances are not present in this case.

The number of criminal cases in which the admission of evidence under Rule 804(b)(5) is being upheld and the extent to which the proper application of that rule has divided the circuits make it clear that the Court will have to accept one or more cases to provide the guidance necessary to assure a uniform and proper application of that rule in criminal cases that come before the federal courts. Petitioner submits that the present case presents the Court with an appropriate vehicle for undertaking important task.

CONCLUSION

The Court should issue a writ of certiorari to review the judgment of the court of appeals in this case for the reasons developed in the initial petition and in this reply.

Respectfully submitted

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